Supreme Court, U.S.
FILED

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NO._____

In The Supreme Court of The United States

PATCO ENERGY EXPRESS, LLC,
PATCO ENERGY EXPRESS II, LLC,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Petitioners,

v.

MICHAEL G. LAMBROS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Has the *Barton* Doctrine been superseded by 28 U.S.C. §959(a) and 11 U.S.C. §543(b)?

2. Does state law control in federal district court as to the effect of a state court decision declaring a state statute unconstitutional?

3. Do federal statutes supersede federal common law rules?

4. Does the *Barton* Doctrine apply to state court receivers where the state court's appointing order grants blanket permission for the receiver to sue and be sued?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Patco Energy Express, LLC, Patco Energy Express II, LLC, and Patco Energy Express III, LLC, have no parent corporations and no publicly held company owns 10% or more of any of the corporations' stock.

LIST OF PARTIES TO THE PROCEEDING

Patco Energy Express, LLC, Patco Energy Express II, LLC, Patco Energy Express, III, LLC,

PETITIONERS

Michael G. Lambros

RESPONDENT

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STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Eleventh Circuit sought to be reviewed was entered on November 24, 2009. (Appendix A-12, 13)

The order denying rehearing was entered on March 23, 2010. (Appendix A-1, 2)

The statutory basis for jurisdiction of this petition is 28 U.S.C. 1254 (1).

This is a petition for writ of certiorari to review an appellate opinion and judgment of the Eleventh Circuit Court of Appeals. Petitioner contends that this Court pursuant to Rule 10 (a) and (c), Rules of the Supreme Court.

Rule 10 (a) applies because the opinion and judgment of the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's supervisory power. The Eleventh Circuit held contrary to Georgia law that a receiver appointed under a Georgia statute that was subsequently declared to be unconstitutional was nonetheless a duly appointed receiver up to the time the statute was declared unconstitutional. This holding is absolutely contrary to Georgia law.

The Constitution of Georgia, 1983, Art. I, Sec. II, Par. V declares that "Legislative acts in violation of this constitution or the constitution of the United

States are void, and the judiciary shall so declare them." (emphasis supplied).

Rule 10 (c) provides the court may hear cases on certiorari where a United States court of appeals has decided on important question of federal law that has not been, but should be settled by this court. The Eleventh Circuit Court of Appeals has decided in the case under review that the *Barton* Doctrine based on *Barton v. Barbour,* 104 U.S. 126, 127 (1888) is still viable even after the adoption of 28 U.S.C. § 959 and 11 U.S.C. § 543 (b). These statutes clearly supersede the *Barton* decision and deprive the *Barton Doctrine* of viability. This court should decide this important question of federal law.

FEDERAL AND STATE STATUTES INVOLVED

11 U.S.C.A. § 101 (11) (A)
United States Code Annotated
Title 11. Bankruptcy
General Provisions
§ 101. Definitions

> In this title the following definitions shall apply:
>
> (11) The term "custodian" means--
>
> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

11 U.S.C.A. § 543
United States Code Annotated
Title 11. Bankruptcy
Chapter 5. Creditors, the Debtor, and the Estate
Subchapter III. The Estate
§ 543. Turnover of property by a custodian

> (a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of,

property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall--

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall--

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services

rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.

(d) After notice and hearing, the bankruptcy court--

(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and

(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance

with such subsections is necessary to prevent fraud or injustice.

28 U.S.C.A. § 959
United States Code Annotated
Title 28. Judiciary and Judicial Procedure
Part III. Court Officers and Employees
Chapter 57. Court Officers and Employees
§ 959. Trustees and receivers suable; management; State laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same

manner that the owner or possessor thereof would be bound to do if in possession thereof.

Ga. Code Ann., 9-8-2
West Code of Georgia Annotated
Title 9. Civil Practice
Chapter 8. Receivers
§ 9-8-2. Protection of property in danger of destruction and loss

Equity may appoint receivers to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.

Ga. Code Ann., 9-8-3
West Code of Georgia Annotated
Title 9. Civil Practice
Chapter 8. Receivers
§ 9-8-3. Protection of property in danger of destruction and loss

Equity may appoint a receiver to take possession of and hold, subject to the direction of the court, any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested. Under extraordinary circumstances, a receiver may be

> appointed before and without notice to the trustee or other person having charge of the assets. The terms on which a receiver is appointed shall be in the discretion of the court.

Ga. Code Ann., 9-8-8
West Code of Georgia Annotated
Title 9. Civil Practice
Chapter 8. Receivers
§ 9-8-8. Protection of property in danger of destruction and loss

> (a) The receiver is an officer and servant of the court appointing him, is responsible to no other tribunal than the court, and must in all things obey its direction.
> (b) The receiver shall discharge his trust according to the orders or decrees of the court appointing him. He is at all times subject to its orders and may be brought to account and removed at its pleasure.

Ga. Code Ann., §16-4-7
Code of Georgia Annotated
Title 16, Crimes and Offenses
Chapter 14, Racketeer Influenced and Corrupt Organizations
§16-14-7. Forfeiture

(a) All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding under the following rules.
(b) A RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the "Georgia Civil Practice Act," except to the extent that special rules of procedure are stated in this chapter.
(c) A RICO forfeiture proceeding shall be an in rem proceeding against the property.
(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. The proceeding may be commenced before or after seizure of the property.
(e) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine

ex parte whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds that reasonable cause does not exist to believe the property is subject to forfeiture, it shall dismiss the complaint. If the court finds that reasonable cause does exist to believe the property is subject to forfeiture but there is not reasonable cause to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue. If the court finds that there is reasonable cause to believe that the property is subject to forfeiture and to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice issue a writ of seizure directing the sheriff of the county where the property is found to seize it.

(f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state

prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within a reasonable time after receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

(g) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by Chapter 11 of Title 9, the "Georgia Civil Practice Act." Service by publication may be ordered upon any party whose whereabouts cannot be determined.

(h)(1) Any person claiming an interest in the property may become a party to

the action at any time prior to judgment whether named in the complaint or not. Any party claiming a substantial interest in the property may upon motion be allowed by the court to take possession of the property upon posting bond with good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture. Such a party taking possession shall not remove the property from the territorial jurisdiction of the court without written permission from the court.

(2) The court may, upon such terms and conditions as prescribed by it, order that the property be sold by an innocent party who holds a lien on or security interest in the property at any time during the proceedings. Any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest shall be paid into court pending final judgment in the forfeiture proceeding. No such sale shall be ordered, however, unless the obligation upon which the lien or security interest is

based is in default.
(3) Pending final judgment in the forfeiture proceeding, the court may make any other disposition of the property which is in the interest of substantial justice.
(i) After service of process, all further proceedings shall be as provided in Chapter 11 of Title 9, the "Georgia Civil Practice Act," except that any party may bring one motion to dismiss at any time and such motion shall be heard and ruled on within ten days. Any party may demand a jury trial.
(j) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture.
(k) Subject to the requirement of protecting the interest of all innocent parties, the court may, after judgment of forfeiture, make any of the following orders for disposition of the property:
(1) Destruction of contraband, the possession of which is illegal;
(2) Retention for official use by any agency of this state or any political subdivision thereof. When such

agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale;

(3) Transfer to the Division of Archives and History of property useful for historical or instructional purposes;

(4) Retention of the property by any innocent party having an interest therein, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. The plan may include, in the case of an innocent party who holds a lien on or security interest in the property, the sale of the property by the innocent party under such terms and conditions as may be prescribed by the court and the payment into court of any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest;

(5) Judicial sale of the property;

(6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or

(7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties.

(l) The net proceeds of any sale or disposition after satisfaction of the interest of any innocent party, less the greater of one-half thereof or the costs borne by the county in bringing the forfeiture action, shall be paid into the general fund of the state treasury. The costs borne by the county or one-half of the net proceeds of sale or disposition, whichever is greater, shall be paid into the treasury of the county where the forfeiture action is brought. Notwithstanding any other provision in this Code section, the court may, after satisfaction of the interest of any innocent party, make any other division of the proceeds among the state, county, or municipalities or agencies of the state, county, or municipalities, which is commensurate with the proportion of the assistance that each contributed to the underlying criminal action, forfeiture, or criminal action and forfeiture.

(m) In lieu of the provisions of subsections (c) through (g) of this Code section, the state may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this Code

section.

(n)(1) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall:

(A) In the case of real property or beneficial interest, relate back to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located and, if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens under Article 9 of Chapter 14 of Title 44 in the official records of the county where the real property or beneficial interest is located and, if no RICO lien notice or notice of lis pendens is so filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located; and

(B) In the case of personal property, relate back to the date the personal property was seized by the investigating agency.

(2) If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a civil

> proceeding or criminal proceeding, whichever is earlier, the investigative agency may, on behalf of the state, institute an action in the appropriate superior court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding; and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action. If a civil proceeding is pending, such action shall be filed only in the court where such civil proceeding is pending.

STATEMENT OF THE FACTS

This case was initiated with the filing of a complaint against Respondent Michael G. Lambros ("Lambros") by Petitioners Patco Energy Express, LLC, Patco Energy Express II, LLC, and Patco Energy Express III, LLC ("Patco"). The complaint alleged as follows. (Appendix 35-45).

On April 9, 2008 Lambros was appointed as the pre-judgment receiver for the various defendants

in the case of *State of Georgia v. Cisco et al.*, Superior Court of Camden County, Georgia, Case No. 2008CV0302-SS2, an action brought under the Georgia civil RICO statutes, O.C.G.A. §§ 16-14-1, *et seq.* Count Three of the complaint in the *Georgia v. Cisco* case sought a judicial appointment of a prejudgment receiver under the Georgia civil RICO law as provided by §16-14-7(m). Lambros was appointed. The order appointing Lambros specifically provided that (1) Lambros would be personally liable for actions taken "recklessly" or "in bad faith" and (2) appear in any action, defend any claim, and become a party to such actions or proceedings "in state or federal court" as he believes may be necessary or appropriate to control assets, or to carry out the terms of the appointing order and has "the power to defend, compromise or adjust or otherwise dispose of any and all suits, actions, or proceedings instituted against the receiver."

The Eleventh Circuit opinion sought to be reviewed misstates the facts throughout. (Appendix A-12,13) For example, the opinion states that, "In this capacity as receiver, Lambros took possession of certain fuel Stations that had been owned and operated by Cisco. Patco claims they own some of the inventory located within those fuel station's (Appendix A-12, 13). This is an incorrect and misleading statement.

The *Georgia v. Cisco* complaint alleged that on or about December 27, 2006, the real property located at 491 St. Mary's Road, Kingsland, Georgia, 5289 Laurel Island Parkway, Kingsland, Georgia,

and 5369 Laurel Island Parkway, Kingsland, GA consisting of three truck stops-gasoline Stations ("the Stations")[1] as well as certain property located in Simpson County, Kentucky, was sold by Cisco to Kuldeep Sekhon ("Sekhon"). The purchase was financed by Tennessee Commerce Bank (hereinafter "Bank"), which took a first mortgage on the property. The sellers in this transaction were Fairley Cisco, acting under the names of Cisco Travel Plaza, Inc., Cisco Travel Plaza II, Inc., Cisco Oil, Inc., Cisco Express, Inc., and Cisco Enterprises, Inc., and the purchasers were Sekhon and United Fuel, Inc. The complaint charged that prior to the sale of the Stations by Cisco to Sekhon, Cisco was engaged in criminal activity by setting the gas and diesel pumps at the Stations so that the pumps showed more gasoline and diesel being sold to the customers than they actually received. Sekhon was charged in the case with continuing this criminal enterprise after assuming control of the Stations from Cisco.[2]

In March of 2008, Sekhon disappeared. Georgia Petro, LLC claimed to have bought Sekhon's interest in the Stations and Kentucky property prior to his disappearance. A deed was recorded in Camden County, Georgia, showing ownership of the Stations by Georgia Petro.

---

[1] The *Georgia v. Cisco* complaint listed the real estate in the title of the complaint, but made no *in rem* charges against the property in the body of the complaint.

[2] Petitioners have never been parties to the *Georgia v. Cisco* case.

Lambros petitioned the appointing court to remove the Stations from the receivership assets. The court granted permission. The Stations were released to Georgia Petro subject to a $17 million mortgage to Tennessee Commerce Bank.

The managing member of the Patco LLCs, was approached in May of 2008 by representatives of Georgia Petro to take over the operation of the Stations. The Stations had been ordered by the Georgia Agricultural Department to cease selling gasoline and diesel fuel. It was necessary for Patco to obtain electricity which had been cut off at the Stations, by posting a deposit of $60,000. Patco paid the Georgia Department of Agriculture $100,000 of a $500,000 fine imposed on Georgia Petro by the Georgia Department of Agriculture and obligated themselves to pay an additional $150,000 for full discharge of the fine. Patco thereby obtained permission for Georgia Petro to begin selling gasoline and diesel at the Stations. Patco purchased the inventory located in the Stations from Georgia Petro and brought in other inventory. Patco signed a lease-purchase with Georgia Petro which included the right to operate the Stations.

The Bank agreed in June, 2008 to sell Patco the first mortgage on the Stations as well as the promissory notes, and other debt obligations held by the Bank. The Bank asked Patco for a good faith deposit of $150,000.00 on this purchase. Patco paid this money to the Bank as a good faith deposit in exchange for the Bank's promise to sell to Patco.

However, without further notice to Patco, the Bank broke its agreement to sell to Patco and instead sold the mortgage, promissory notes, and other debt instruments on the Stations and the Kentucky property to Michael W. Nicholson. Patco was informed by Nicholson that he would in turn sell to Patco the mortgage, promissory notes, and other debt instruments less the Kentucky property and certain property near the Stations for $18,000,000, which would create a substantial profit for Nicholson. Since Patco was in place, it decided to accept the offer despite the Bank's breach. Agreements to this effect were executed among the Bank, the Patel family, and Nicholson on June 30, 2008.

On or about September 2, 2008, Lambros foreclosed a $4,000,000 second mortgage on the property from United Fuel, Inc. and Sekhon to Fairley Cisco. He did not file the foreclosure deed until October of 2008.

On October 30, 2008, Lambros wrote Patco a letter stating that by virtue of the foreclosure of the second mortgage he now had title to the Stations. He demanded that Patco deliver immediate possession of the Stations to Lambros or he would file an action for possession. On January 10, 2009, Patco and the Patels closed the Stations and turned the keys over to the Camden County District Attorney, the plaintiff in the Georgia RICO action, for delivery to Lambros.

Lambros with the support of the local police seized the inventory and the improvements that Patco had purchased and placed in the Stations. A letter dated January 7, 2009 from one of Lambros' counsel, warned Patco that they were not to remove any of the inventory or any of the improvements they had placed on the property. Patco requested Lambros to provide the legal basis on which he had seized Patco's inventory and improvements. Lambros did not respond.

Patco was not given a hearing prior to Lambros' seizure of their inventory and improvements nor provided with a hearing subsequent to the seizure of said property. Patco is not and never has been a party to the Georgia RICO action in which Lambros was appointed as Receiver.

Patco filed this 42 U.S.C. § 1983 action on January 27, 2009 charging Lambros with unlawful and unconstitutional seizure of Patco property. On February 2, 2009, Lambros filed a motion in the *Georgia v. Cisco* state court case seeking permission to sell Patco's seized property at auction. On February 6, 2009, Patco filed in the district court a motion for a temporary restraining order and a preliminary injunction against Lambros, presenting to the Georgia state court a motion to sell Patco's property.

On February 16, 2009, Lambros filed a motion to dismiss on two grounds: (1) Patco failed to get permission to file suit against Lambros from the Superior Court of Camden County before bringing

suit; and (2) Lambros was entitled to absolute judicial immunity and qualified immunity. On May 8, 2009, the district court entered an order granting Lambros' motion to dismiss.

The stated basis for the court dismissing the case was, "In Georgia, a plaintiff must obtain leave of the court appointing a receiver to sue that receiver," citing a 1926 case, *Bugg v. Lang*, 35 Ga.App. 704, 704 (1926). The district court further held that the doctrine of *Barton v. Barbour*, 104 U.S. 126, 127 (1888), states the general rule that one must obtain the permission of the court appointing a receiver to sue the receiver, which particularly applied where the receiver was appointed by a state court and is being sued in a federal court. The court noted an exception to this rule stated in 28 U.S.C. § 959(a), which provides that receivers could be sued without leave of the court "with respect to any of their acts or transactions in carrying on the business connected with" the property under their control. The court held, without explanation, that the complaint in this case did not complain of acts committed by Lambros while carrying out Lambros' business operations, but instead related to the "administration" and "liquidation" of the receivership property. The court then made its final holding that, "Because [Patco] failed to obtain such consent before filing the complaint in this case, this Court lacks subject matter jurisdiction over [Patco's] claims."

Again, the Eleventh Circuit opinion misstates the facts concerning the case. The opinion states

that, "Patco contends they were not required to obtain permission from the appointing court because a recent Georgia Supreme Court opinion invalidated a portion of the RICO statute that formed the basis for the state's action against Fairley Cisco. [Citation] Lambros' appointment as receiver was prompted by that RICO action." This is incorrect and misleading.

The Defendants in the state case of *Georgia v. Cisco* appealed to the Georgia Supreme Court the trial court's denial of their motion to dismiss that case based on the unconstitutionality of the pre-judgment receiver appointment provisions of the Georgia RICO act. On June 15, 2009, the Georgia Supreme Court in *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (Ga. 2009), held that the *Georgia v. Cisco* case should have been dismissed because the *in personam* forfeiture provisions of the statute under which the case was brought, O.C.G.A. § 16-14-7(m), are unconstitutional. (*Id.* at *2). The court held that the *in personam* forfeiture provision, O.C.G.A. §16-14-7(m), of the Georgia Civil RICO statute states a criminal *in personam* forfeiture provision and that Georgia's civil procedure rules which O.C.G.A. §16-14-7(m) expressly utilizes, are not adequate to protect an *in personam* defendant's constitutional rights. Therefore, O.C.G.A. §16-14-7(m) is unconstitutional. (*Id.* at *2). The court held that "the entire emphasis of the complaint is on the criminal culpability of the defendants for the alleged crimes."

> We have little trouble concluding that the *in personam* RICO forfeiture

> provision in O.C.G.A. § 16-14-7 (m) is, by its nature, necessarily criminal and punitive. We therefore hold that, by the clearest proof, O.C.G.A. § 16-14-7 (m) imposes a sanction on appellants that it is punitive in form and effect as to render the proceeding criminal despite the Legislature's language to the contrary."

See *Hudson v. United States, supra*, 522 U.S. at 104; *United States v. Ursery, supra*, 518 U.S. at 290. (*Id.*). The court further held that, "O.C.G.A. § 16-14-7(m) lacks all of the procedural safeguards seen in our federal and sister state counterparts and expressly rejects even the minimum safeguards provided elsewhere in O.C.G.A. § 16-14-7 for *in rem* RICO forfeiture proceedings."[3] (*Id.* at *6). The trial court was reversed. (*Id.*).

The only basis on which the district court dismissed this case was that Lambros was a receiver appointed by a state court and Patco did not get the permission of the state court to sue him in federal court as Patco was required to do. The receiver was appointed pursuant to an unconstitutional statute, Georgia law is clear that his appointment was a nullity and void *ab initio*.

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[3] Even though real property was listed in the heading of the complaint, there were no *in rem* charges in the complaint.

ARGUMENT

The Georgia Law Made the Receiver's Appointment *Ab Initio*

The Eleventh Circuit opinion erroneously ignored Georgia law and held (1) that until the receiver appointment statute was declared unconstitutional, the receiver's appointment under the subsequently declared unconstitutional statute was valid and the receiver was duly appointed, and (2) the decision declaring the statute unconstitutional is irrelevant to this case. The opinion fails to state any authority for this position. The opinion ignores the Georgia law as to the effect of a declaration of unconstitutionality on an action taken under the statute.

The law of Georgia is clear that an unconstitutional statute is void and as if it never existed. In *Wellborn v. Estes*, 70 Ga. 390 (1883), the court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The Constitution of Georgia, 1983, Art. I, Sec. II, Par. V declares that "**Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them.**" (emphasis supplied). Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. *Jordan v. Franklin*, 131 Ga. 487, 62 S.E. 673, 673 (1908); *Worth County v. Crisp County*, 139 Ga. 117, 76 S.E. 747, 747-748 (1912); *James v. Blakely*, 143 Ga. 117, 84 S.E. 421, 432-433 (1915); *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 797, 120 S.E. 120 (1923).

See also *State Highway Department v. H.G. Hastings Co.*, 187 Ga. 204, 215, 199 S.E.2d 793 (1938); *Tarpley v. Carr*, 204 Ga. 721, 727, 51 S.Ed.2d 638 (1949) (City officers were not *de facto* officers of office created under an unconstitutional charter);[4] *Franklin v. Harper*, 205 Ga. 779, 784, 55 S.E.2d 221 (1949); *Baggett v. Linder*, 208 Ga. 590, 591, 68 S.Ed.2d 469 (1952); *Milan v. Adams*, 216 Ga. 440, 444, 117 S.E.2d 343 (1960); *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 787, 125 S.Ed. 2d 207 (1962) ("...the remedy provided in the ordinance is not even law if the petitioner's constitutional attack is sustained."); *Dobson v. Brown*, 225 Ga. 73, 76, 166 S.Ed 2d 22 (1969) ("'Not even estoppel can legalize or vitalize that which the law declares unlawful and void.'"); and *Mapp v. First Georgia Bank, et al.*, 156 Ga.App. 380, 274 S.E.2d 765 (1980). The foregoing authorities are overwhelmingly in favor of the proposition that the appointment of Lambros as a receiver was a legal nullity.

An unconstitutional statute, though having the form, features, and name of law, is in reality no law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, **and affords protection to no one.** *Norton v. Shelby County*, 118 U.S. 425, 442-443, 6 S.Ct. 1121, 30 L.Ed. 178 (1888); *Ex parte Siebold*, 100 U.S. 371, 376, 25 L.Ed. 717 (1879); *McCants v.*

---

[4] Tarpley establishes that Lambros was no receiver in this case, *de facto, de jure*, or otherwise.

Layfield, 149 Ga. 231, 238, 99 S.E. 877 (1919). The effect of *Georgia v. Cisco* is to nullify any appointment of Lambros as a receiver. He was never a duly appointed receiver.

Therefore, the attempt made in the opinion to give the unconstitutional appointment of Lambros as a receiver legal status and life even long enough to require that he be treated as a receiver for "permission to sue" purposes is misplaced and wrong.

The Opinion Completely Ignores the Fact That the Order Appointing Lambros Gave Blanket Permission for Lambros to Sue and to be Sued

The appointing order naming Lambros as receiver stated as follows:

> Michael G. Lambros, Esq., an attorney-at-law and a member of the State Bar of Georgia, is appointed to act as receiver (the "Receiver"), with full power of an equity receiver under the laws of Georgia, for the "Enjoined Defendants". (emphasis supplied) (Exhibit A, § 4, p. 5).

The appointing order provides that the receiver "has the power to defend, compromise or adjust or otherwise dispose of any and all suits, actions or proceedings **instituted against the Receiver** or against any of the Enjoined Defendant

(sic)." (*Id.* at 7). This language clearly states that the receiver may be sued without further permission. Otherwise, there would be no need to grant him such power to defend suits brought against him in advance of specific requests to sue.

The relevant Georgia law with regard to the appointment of equity receivers and their powers and authority clearly limits the powers and immunities of Georgia equity receivers to the powers and immunities listed in the appointing order.

> O.C.G.A. § 9-8-3. Appointment, in order to protect assets of debtor; notice; discretion as to terms
> Equity may appoint a receiver to take possession of and hold, *subject to the direction of the court*, any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested. Under extraordinary circumstances, a receiver may be appointed before and without notice to the trustee or other person having charge of the assets. *The terms on which a receiver is appointed shall be in the discretion of the court.* (emphasis supplied).

Therefore, even if Lambros had been constitutionally appointed, which he was not, he was not immune from suit without permission of the appointing court because the appointing order provided that he could be sued and gave him the power to defend and resolve such cases.

The Barton Doctrine Has Been Superseded by Federal Statutes

The *Barton* Doctrine has been superseded by statute. In *Barton v. Barbour*, 104 U.S. 126 26 L.Ed 672 (1881), the Supreme Court announced a common law rule that a lawsuit brought against a railroad receiver appointed by a state court for negligent operation of the railroad during the receivership could not be prosecuted without leave of the receivership court. In *Barton*, the plaintiff, a passenger in a railroad car, was injured when the car was thrown from the tracks. The plaintiff alleged that her injuries were due to the negligence of the railroad company and sued the receiver of the company in a District of Columbia court. The receiver was appointed by a Virginia court to run and operate the railroad.

The Eleventh Circuit pointed out that the exception of 28 U.S.C. §959(a) to the *Barton* rule was that persons injured in the operation of the business were excused from seeking permission to sue the receiver running the operation from the appointing court before filing suit in another court. The *Carter* court used the example of a slip and fall case in a mercantile operation. Common sense shows that the

exception swallows the rule because the facts on which the decision in *Barbour* was made involved a tort where a railroad passenger was injured by negligence, an action no different than the example used in the *Carter* case.

The *Barton* opinion could not decide on facts which were not before the court and *Barton* could not apply to facts that were not before the court. The only facts before the court were those of a receiver who injured a person by negligence while operating a business. 28 U.S.C. §959(a) provides that permission from the appointing court to sue a receiver is not required where the case is that of a receiver sued for injuries caused while operating a business. The facts of a receiver engaging in any other activities were not before the *Barton* court. Any holding regarding such facts would be dicta because the issue of whether a receiver doing something other than operating a business was not before the *Barton* court. 28 U.S.C. §959(a) reversed the decision in *Barton*. The statute clearly superseded *Barton v. Barbour* in its entirety because *Barton v. Barbour* dealt only with the exception to the rule set forth in 959(a).

Moreover, 11 U.S.C. §543(b), enacted long after *Barton* was decided, expressly requires the turnover of a debtor's assets that are subject to state court orders. Section 543(b) applies to "custodians," including a "receiver or trustee of any property of the debtor appointed in a case or proceeding not under this title, 11 U.S.C. 101 (11) (A). Consequently, §543(b) supersedes the *Barton* Doctrine with respect

to a debtor bringing an action to compel the turnover of its property.

The *Barton* Doctrine has thus been stripped of any meaning since under 28 U.S.C. §959 (a) it does to apply to receivers operating a business, the only holding in *Barton*, and does not apply under 11 U.S.C. 101 (11) (A) to prevent the turnover to bankruptcy court of property subject to state court control. These two statutes, which supersede federal common law, have clearly superseded the *Barton* Doctrine.

11 U.S.C. § 543(b) provides that a custodian shall deliver to the bankruptcy trustee any property of the debtor held by or transferred to such custodian that is in said custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case. To prove a claim for turnover under § 543(b)(1) the trustee must demonstrate that a custodian has possession, custody or control of the property and that such property is the property of the debtor. *In re Mason*, 386 B.R. 715, 722 (Bankr. N.D. Ill. 2008). In *In re Automotive Professionals, Inc.*, 2007 WL 1958595 *7 (Bankr. N.D. Ill. 2007) a bankruptcy trustee attempted to recover assets of a debtor under the control of the state court. The state court invoked the *Barton* Doctrine to require the bankruptcy trustee to get the approval of the state court before proceeding to demand a turnover of assets. The court held that the *Barton* Doctrine has no application to a debtor in bankruptcy because the Bankruptcy Code contains the controlling federal

law on the subject. A state court order appointing a receiver cannot prevent a debtor from filing for bankruptcy and a debtor need not obtain the approval of the state court to obtain control of property of the estate. *Id.*

In re Prism LLC, 2009 WL 2924166 *2, n. 9 (Bankr. D. Md. 2009), held that "a receiver appointed in state court proceedings is a 'custodian' within the meaning of 11 U.S.C. §101 (11)(A)" which "defines the term custodian as 'receiver or trustee of any property of the debtor's.' " *See also In re Assoc. LLC*, 188 B.R. 743, 748 (Bankr. S.D.N.Y. 1995).

There Was No Basis for the Seizure

Petitioners were not parties to the *Cisco* case in which Lambros was named as receiver. The Stations were occupied by Patco at a time when the receiver had no interest therein because he had resigned the interest. In October, the receiver asserted a new interest arising from the foreclosure of a second mortgage in September. In January, the receiver, without any prior or subsequent hearing, signed seized Petitioners' inventory and improvements to the Stations. The receiver could not give any reason for the seizure. His testimony was as follows:

> Q. What debt is it that you contend is owed to you by the PATCO entities?

A. At the time the debt would have been most likely to failure to pay any rent.

Q. Pardon me now. I do not know what you mean by most likely but what was the debt that Mr. Walker was referring to in this letter on your behalf that he was trying to collect?

A. I assume rent. I assume rent.

Q. What do you mean assume it?

A. Because I don't know any other explanation sitting here today so I assume that it is rent.

The seizure by the testimony of Lambros himself had no basis in an indebtedness. The plaintiffs were not parties to the case in which Lambros claimed to be acting as receiver. Plaintiffs had no debt to any party in that case. According to the erroneous district and circuit court opinions in this case, the *Barton* Doctrine required plaintiffs to become parties to that case to seek permission to sue the receiver for the theft, or, to be more polite, conversion of their property. The plaintiffs were lawfully on the property, were told by the receiver to get off, did so, and the receiver stole their inventory on the way out. The appointing order gave permission for the receiver to be sued. The *Barton* Doctrine has no application to this case.

CONCLUSION

The Eleventh Circuit erred in holding that the Barton Doctrine is still viable. The truth of the matter is that other than a reference in the case in a dissent, the Supreme Court has not cited the case since it was decided. The Eleventh Circuit did not decide until 2000 *Carter v. Rogers*, 220 F.3d 1249, 1252 (11th Cir. 2000) that a debtor must first obtain leave of the bankruptcy court before it can initiate an action in the district court when that action is against a bankruptcy appointed officer for acts done in the officer's official capacity. *Carter* held the *Barton* Doctrine did apply subject to the "exception" in 28 U.S.C. §959 (a). This is the only published opinion of the Eleventh Circuit interpreting the *Barton* Doctrine prior to the case of *Lawrence v. Goldberg*, 573 F. 3d 1265, 1269 (Cir. 2009).

The foregoing establishes that (1) the *Barton* Doctrine has been superseded by 28 U.S.C. §959(a) and 11 U.S.C. §543(b); (2) Georgia law renders the receiver's appointment void *ab initio* because of the unconstitutionality of the appointing statute; (3) the federal common law *Barton* Doctrine is superseded by 28 U.S.C. §959(a) and 11 U.S.C. §543(b); and (4) the state court authorized suits against the receiver.

This Court should grant certiorari to decide these important questions of federal law.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10790
Non-Argument Calendar

D.C. Docket No. 09-00004-CV-2

PATCO ENERGY EXPRESS, LLC,
PATCO ENERGY EXPRESS II, LLC,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Plaintiffs-Appellants,

versus

MICHAEL G. LOAMBROS,

Defendant-Appellee.

No. 09-12547
Non-Argument Calendar

D.C. Docket No. 09-00004-CV-2-LGW-JEG

PATCO ENGERY EXPRESS, LCC,
Georgia Limited Liability Companies,
PATCO ENERGY EXPRESS II, LCC,
Georgia Limited Liability Companies,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Plaintiffs-Appellants,

versus

MICHAEL G. LAMBROS,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Georgia

(November 24, 2009)

Before BLACK, BARKETT and COX, Circuit Judges.

PER CURIAM:

Patco Energy Express, LLC, Patco Energy Express II, LLC, and Patco Energy Express III, LLC ("Patco") appeal the district court's dismissal for

want of subject matter jurisdiction of their action against Michael G. Lambros for claims pursuant to 42 U.S.C. § 1983 and for conversion. We affirm.

The State of Georgia brought a civil action in the Superior Court of Camden County, Georgia, against Fairley Cisco asserting that Cisco violated the Georgia Racketeer Influenced and Corrupt Organizations ("RICO") Act. Due to the RICO action, the superior court appointed Lambros receiver over the property of Cisco. In his capacity as receiver, Lambros took possession of certain fuel stations that had been owned and operated by Cisco. Patco claims they own some of the inventory located within those fuel stations. Without first seeking the permission of the superior court to file suit against its court-appointed receiver, Patco filed a 42 U.S.C. § 1983 action against Lambros in the United States District Court for the Southern District of Georgia alleging that the seizure of the inventory violated the due process clauses of the Fifth and Fourteenth Amendments. Their complaint also included a state law conversion claim.

One week after Patco filed suit in district court, Lambros moved the superior court for permission to sell, at auction, the property claimed by Patco. Patco then moved for a temporary restraining order and preliminary injunction, asking the district court to enjoin the superior court from approving the auction. Patco's motion was denied, and they appealed. Less than one week later,

Lambros moved the district court to dismiss the suit for lack of subject matter jurisdiction and for failure to state a claim for relief because Lambros was entitled to immunity from suit. The district court dismissed the case, ruling that because Patco failed to obtain permission for the superior court to sue Lambros, its court-appointed receiver, the district court lacked subject matter jurisdiction over the case. Patco appealed the dismissal, and that appeal was consolidated with the appeal of the denial of the motion for temporary restraining order and preliminary injunction.

The *Barton* doctrine is a creature of both Georgia law and federal common law; it teaches, "that before a suit can be maintained against a receiver... it is necessary that the consent of the court appointing him be first obtained." *Bugg v. Lang,* 134 S.E. 623, 623 (Ga. App. 1926) (citation omitted); *Barton v. Barbour,* 104 U.S. 126, 127 (1888). This rule applies equally whether a state court appointed receiver is sued in state court, or as in the case, the receiver is sued in federal court. *See Carter v. Rodgers*, 220 F.3d 1249, 1253 (11th Cir. 2000) (applying *Barton* doctrine to suit against a bankruptcy trustee and holding "when leave is required, it is required before pursuing remedies in either state or other federal courts.") Where a plaintiff neglects to obtain leave from the appointing court, a suit filed against the receiver in another court must be dismissed for lack of subject matter jurisdiction. *Id.*

Patco's complaint foes not allege that they sought leave of the Superior Court of Camden County before filing suit against Lambros in the district court. So, unless some exception to the *Barton* doctrine applies to this case—and one does not—the district court did not have subject matter jurisdiction over Patco's claims.

An exception to the *Barton* doctrine permits suits against receivers without leave of the appointing court with respect to acts or transactions "in carrying on the business connected with such property." *Carter*, 220 F.3d at 1254 (citing 25 U.S.C. § 959(a)). This exception contemplates "actions redressing torts committed in furtherance of the debtor's business." *Id.* (quotation omitted). For example, if a customer of a gas station operated by a receiver slips and falls while shopping and alleges the fall was caused by negligence attributable to the receiver, the customer could bring suit against the receiver without first seeking permission for the appointing court. Here, however, Patco's allegations arise from liquidation of gas station assets, not the operation of the gas stations. Because they did not related to any "business connected with such property," this exception does not apply.

Patco contends they were not required to obtain permission from the appointing court because a recent Georgia Supreme Court opinion invalidated a portion of the RICO statute that formed the basis

for the state's action against Fairley Cisco. *See Cisco v. State*, 680 S.E.2d 831 (Ga. 2009). Lambros's

appointment as receiver was prompted by that RICO action. Whether or not *Cisco* decision affects Lambros's status as receiver, it is not relevant to this appeal. When Lambros committed the acts of which Patco complains, when Patco filed this lawsuit, and when the district court dismissed this case, Lambros was a duly appointed receiver. Nothing in the *Cisco* case relieves Patco of the duty to seek leave from the appointing court before filing suit against Lambros in a second court.

Patco were required, yet neglected, to obtain consent from the Superior Court of Camden County before filing suit in the district court. The district court correctly held that it lacked subject matter jurisdiction over Patco's claims.

Because the district court did not have subject matter jurisdiction to address Patco's motion for a temporary restraining order and preliminary injunction, we vacate the denial of this motion and dismiss the motion for want of jurisdiction. (R.1-17 at 20.) With the record so modified, we affirm the final judgment dismissing the action for want of jurisdiction.

CONCLUSION

For the foregoing reasons, we affirm the judgment.

ORDERS ON MOTION VACATED and DISMISSED; FINAL JUDGMENT AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10790

D.C. Docket No. 09-00004-CV-2

PATCO ENERGY EXPRESS, LCC,
PATCO ENERGY EXPRESS II, LCC,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Plaintiffs-Appellants,

versus

MICHAEL G. LAMBROS,

Defendant-Appellee.

No. 09-12547

D.C. Docket No. 09-00004-CV-2-LGW-JEG

PATCO ENGERY EXPRESS, LCC,
Georgia Limited Liability Companies,
PATCO ENERGY EXPRESS II, LCC,

Georgia Limited Liability Companies,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Plaintiffs-Appellants,

versus

MICHAEL G. LAMBROS,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Georgia

Before BLACK, BARKETT and COX, Circuit Judges.

BY THE COURT:

Appellants' Motion to Strike Appellee's Motion for Sanctions is DENIED.

Appellee's Motion for Sanctions pursuant to Fed. R. App. P. 38 is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10790

D.C. Docket No. 09-00004-CV-2

PATCO ENERGY EXPRESS, LCC,
PATCO ENERGY EXPRESS II, LCC,
PATCO ENERGY EXPRESS III, LLC,
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No. 09-12547

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PATCO ENGERY EXPRESS, LCC,
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PATCO ENERGY EXPRESS II, LCC,
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PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Plaintiffs-Appellants,

versus

MICHAEL G. LAMBROS,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	November 24, 2009
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

PATCO ENERGY EXPRESS, LLC, PATCO ENERGY EXPRESS II, LLC, and PATCO ENERGY EXPRESS III, LLC, Georgia limited liability companies,	)
Plaintiffs,	)
CIVIL ACTION NO. CV209-004	)
v.	)
MICHAEL G. LAMBROS,	)
Defendant.	)

NOTICE OF APPEAL

Come now the Plaintiffs and appeal to the United States Court of Appeals for the Eleventh Circuit from the order of this Court dated May 8, 2009 granting Defendant's motion to dismiss.

Respectfully submitted,

/s/ William Eugene Rutledge
William Eugene Rutledge
Attorney for Plaintiffs

OF COUNSEL:

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing to the following:

Johannes S. Kingma, Esq.
John C. Rogers, Esq.
Carlock, Copeland & Stair, LLP
2600 Marquis Two Tower
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Submitted this the 13th day of May, 2009.

/s/ William Eugene Rutledge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

PATCO ENERGY EXPRESS, LLC, PATCO ENERGY EXPRESS II, LLC, and PATCO ENERGY EXPRESS III, LLC, Georgia limited liability companies,	)
Plaintiffs,	)
CIVIL ACTION NO. CV209-004	)
v.	)
MICHAEL G. LAMBROS,	)
Defendant.	)

NOTICE OF APPEAL

Come now the Plaintiffs and appeal to the United States Court of Appeals for the Eleventh Circuit from the order of this Court dated February 11, 2009 granting Plaintiffs' motion for temporary restraining order and preliminary injunction.

Respectfully submitted,

/s/ William Eugene Rutledge
William Eugene Rutledge
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CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing to the following:

Johannes S. Kingma, Esq.
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Submitted this the 12th day of February, 2009.

/s/ William Eugene Rutledge
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

PATCO ENERGY EXPRESS, LLC, PATCO ENERGY EXPRESS II, LLC, and PATCO ENERGY EXPRESS III, LLC, Georgia limited liability companies,

Plaintiffs,

v. CIVIL ACTION No.: 209-004

MICHAEL G. LAMBROS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Patco Energy Express, LLC, Patco Energy Express II, LLC, and Patco Energy Express III, LLC, Georgia limited liability companies ("Patco"), filed the above-captioned case against Defendant Michael G. Lambros on January 27, 2009, asserting claims under 42 U.S.C. § 1983 and for conversion.

In their complaint, Plaintiffs allege that Defendant, acting under color of state law as

Receiver for Fairley Cisco ("Cisco"), acted in bad faith in seizing Plaintiffs' property without granting Plaintiffs a hearing as Plaintiffs allege is required by the Fifth and Fourteenth Amendments to the United States Constitution. Complaint ¶ 22. Doc. No. 1. Plaintiffs allege that Defendant is liable under § 1983 for the damages incurred by Plaintiffs as a result of Defendant's alleged constitutional violations, and that Defendant is liable for the damages incurred by Plaintiffs as a result of Defendant's illegal conversion. *Id.* ¶¶ 22, 24.

On February 2, 2009, Mr. Lambros, in his capacity as Receiver for Cisco, filed a motion in the Superior Court of Camden County, Georgia, seeking the Superior Court's permission to sell the property -- no claimed by Plaintiffs as belonging to them -- at auction. *See* Receiver's Motion to Sell Various Items of Property Located Upon Real Property of the Receivership Estate in Camden County, Georgia ¶ 21, Exhibit "B" to Plaintiffs' Motion for Emergency Hearing and Temporary Restraining Order and Preliminary Injunction (hereinafter "Receiver's Motion"). Doc. No. 11.

In response to the Receiver's motion in Camden County Superior Court, Plaintiffs in the instant case filed a motion for temporary restraining order and a preliminary injunction on February 2, 2009. In that motion, Plaintiffs ask the Court to issue a preliminary injunction enjoining the Superior Court of Camden County from ordering that the

property at issue be sold at auction. Due to the pendency of the motion in Camden County Superior Court, Plaintiffs in the instant case requested an expedited hearing on the issue. This Court granted Plaintiffs' request for an expedited hearing and heard oral argument on February 10, 2009. After hearing oral argument, receiving evidence, hearing testimony, and considering the briefs submitted by Plaintiffs on this issue, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 (a) (2) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. The State of Georgia, through Stephen D. Kelley, District attorney for the Brunswick Judicial Circuit, brought a civil action in the Superior Court of Camden County, Georgia, against Fairley Cisco, owner of various fuel stations throughout Georgia, asserting that Cisco violated the Georgia Racketeer Influenced and Corrupt Organizations Act, Georgia Code Sections 16-14-1 *et seq.* ("RICO"). That case is styled *State of Georgia v. Cisco,* No. 08V0302-SS2 (Camden Co. Sup. Ct.). *See* Complaint ¶3. Doc. No. 1; Exhibit "A" to Plaintiffs' Motion. Doc. No. 11.

2. On April 8, 2008, the Camden County Superior Court granted the State of Georgia's motion for a preliminary injunction in the state RICO suit, and appointed Michael G. Lambros as Receiver for Cisco. *See* Exhibit "A" to Plaintiffs' Motion, at 5.

3. In the April 8 order, the Camden County Superior Court empowered Mr. Lambros, as Receiver for Cisco to:

> Take and retain possession, custody, and control, of all assets and property...in which any Enjoined Defendant holds a direct or indirect interest, which power includes the power to sell, transfer, or otherwise dispose of any such asset of property...

Id. The Superior Court's order also empowers Mr. Lambros to:

> In his discretion as he deems appropriate, manage, control, operate, supervise, oversee, and maintain Enjoined Defendants' business...with the right to possess, receive, or use income earnings, rents, and profits to commence, maintain, defend, or participate in legal proceedings to sue for, collect, receive and take into possession of, all goods, chattels, rights, [and] general intangible....

Id. at 6.

4. The instant complaint alleges that prior to the filing of the Georgia RICO action. On or about December 27, 2006, the fuel stations at issue were sold by Cisco to Keldeep Sekhon. Complaint ¶ 4.

5. On or about March of 2008, Sekhon allegedly disappeared and a party calling itself Georgia Petro, LLC claimed to have purchased Sekhon's interest in the fuel stations prior to his disappearance. *Id.* ¶ 6.

6. In May of 2008, Plaintiffs were allegedly approached by representatives of Georgia Petro, LLC about taking over the operations of the fuel stations. Plaintiffs eventually agreed to operate the stations and, after Mr. Lambros was appointed Receiver, Plaintiffs eventually began operating the stations, including selling gasoline and diesel fuel. *Id.* ¶ 7.

7. Subsequent to Plaintiffs taking over operations of the fuel stations, Plaintiffs claim that they purchased inventory to sell at the fuel stations. *Id.* ¶ 8.

8. On October 30, 2008, through certified mail, counsel for Mr. Lambros, Duncan D. Walker III, notified counsel for Plaintiffs that Mr. Lambros was on that date the owner of the fuel stations occupied by Plaintiffs – by virtue of a conveyance of the property by the previous owners to Mr. Lambros pursuant to a Deed Under Power of Sale – and that Plaintiffs' interest in the property had been divested.

See Exhibit "C" to Plaintiffs' Motion. In that same letter, counsel for Mr. Lambros informed Plaintiffs'

attorney that Plaintiffs were tenants at sufferance and that Mr. Lambros, as owner of the property, terminated any possessory rights that Plaintiffs might claim to the property. *Id.* The letter also informed counsel for Plaintiffs that Mr. Lambros was demanding possession of the property and that, in the event Plaintiffs did no surrender the property to Mr. Lambros, a summary dispossessory action would be initiated under Georgia law. *Id.*

9. In response to the October 30 letter, on November 10, 2008, counsel for Plaintiffs, through certified mail, sent counsel for Mr. Lambros a letter informing him that Plaintiffs would not turn over possession of the fuel stations without a court order directing them to do so. *See* Exhibit "D" to Plaintiffs' Motion.

10. On January 5, 2009, representatives of Plaintiff companies, and their counsel, met with Mr. Lambros and his counsel in an effort to resolve the issues between them. After some negotiations, the parties determined that they would be unable to reach an agreement and the meeting was terminated. Complaint ¶ 14.

11. On January 6, 2009, counsel for Plaintiffs sent counsel for Mr. Lambros a letter informing him that, in light of the failed negotiations, Plaintiffs no longer desired to operate the fuel stations and that the

properties would be handed over to Mr. Lambros at a pre-arranged time pursuant to his October 30 demand. *See* Exhibit "E" to Plaintiffs Motion.

12. On January 7, 2009, counsel for Mr. Lambros informed counsel for Plaintiffs that Mr. Lambros was prepared to take possession of the fuel stations on January 12, 2009. *See* Exhibit "F" to Plaintiffs' Motion. In that same letter, counsel for Mr. Lambros also informed counsel for Plaintiffs that Plaintiffs were prohibited by the April 8 injunction, issued by the Camden County Superior Court, from removing any asset from the fuel stations. *Id.*

13. Thereafter, on January 10, 2009, Plaintiffs closed the fuel stations and turned the keys over to the Camden County District Attorney, the plaintiff in the Georgia RICO action, for delivery to Mr. Lambros. Complaint ¶ 15.

14. Sometime after the fuel stations were closed, Mr. Lambros, as Receiver for Cisco, and pursuant to the April 8 injunction issued by the Camden county Superior Court, allegedly seized the inventory located in the fuel stations that had been operated by Plaintiffs. Mr. Lambros hired security to guard the stations and ensure that nobody, including Plaintiffs, removed anything from the stations without his permission. *Id.* ¶ 16.

15. On January 13, 2009, counsel for Mr. Lambros sent an e-mail to counsel for Plaintiffs informing him that, despite the January 7 letter, inventory was being removed from the fuel stations. *See* Exhibit "G" to Plaintiffs' Motion. The e-mail went on to state that the local police had been alerted and to warn Plaintiffs that they would face criminal trespass and

theft charges if they attempted to remove any more inventory from the fuel stations. *Id.*

16. On January 27, 2009, Plaintiffs filed the instant case in this Court, asserting that Mr. Lambros' seizure of the inventory allegedly purchased by Plaintiffs to stock the fuel stations, without a pre- or post-seizure hearing, violated the due process clauses of the Fifth and Fourteenth Amendments, and that Mr. Lambros was liable for the losses incurred by Plaintiffs as a result of this allegedly unconstitutional seizure. Complaint ¶¶ 20, 22.

17. On February 2, 2009, Mr. Lambros, as Receiver for Cisco, filed a motion with the Camden County Superior Court, seeking the Superior Court's permission to sell the inventory -- which Plaintiffs in the instant suit claim belongs to them – at auction. *See* Exhibit "B" to Plaintiffs' Motion.

18. On February 6, 2009, Plaintiffs field the instant motion with this Court, asking this Court to enjoin the Camden County Superior Court from approving any such auction in the state RICO action.

CONCLUSIONS OF LAW

1. Plaintiffs in this case seek a preliminary injunction enjoining the Superior Court of Camden County, Georgia from approving a sale of the inventory at issue by Mr. Lambros. When deciding whether to issue such an injunction, the Court must

be mindful that injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Resources Defense Council, Inc.*, 129 S. Ct. 365, 375-76 (U.S. 2008). *See also All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)("A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites."). As such, it is Plaintiffs that bear the burden of persuasion in this case.

2. Traditionally, a District Court may grant a preliminary injunction only if the movant clearly establishes the following:

> (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction is issue, and (4) an injunction would not disserve the public interest.

N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008) (citations omitted).

3. Before the Court may issue a preliminary injunction, the plaintiff must show that irreparable

harm is not merely "possible," but "likely." *Winter*, 129 S. Ct. at 375.

4. "An injury is 'irreparable' only if it cannot be undone through monetary remedies." *See, e.g., Deerfield Med. Ctr. V. City of Deerfield Beach*, 661 F.2d 338 (11th Cir. 1981).

5. It is true that the irreparable harm requirement can sometimes be established by showing that the action sought to be enjoined would cause injuries in the form of lost opportunity "which are difficult, if not impossible, to quantify." *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 142 (11th Cir. 2005).

6. In this case, Plaintiffs assert that they have established irreparable harm because the sale of the property at issue would deprive Plaintiffs of the opportunity to dispose of the property in ways more likely to bring higher prices, and that it would be impossible to theoretically place a value on that missed opportunity. *See* Plaintiffs' Memorandum at 7. That is, Plaintiffs allege that, if the contents of the convenience store are sold at auction as contemplated by Mr. Lambros, they will fetch lower prices than if sold in a non-action setting. The Court is willing to entertain that argument. What the Court rejects is the Plaintiffs' unsupported argument that it is impossible to quantify the price difference in goods sold at action versus goods sold in a more leisurely manner. Such calculations are rendered and accepted in court regularly. The Court further rejects Plaintiffs' argument that the President's

proposed stimulus plans somehow make the economy uncertain to the extent that an injunction is in order.

7. Unlike in *MacGinnitie*, this case does not present the situation where Plaintiffs' harm would be impossible, or even difficult, to quantify.

8. Alternatively, Plaintiffs assert that they have established irreparable harm by alleging a violation of substantive constitutional rights. In support of this argument, Plaintiffs cite *Elrod v. Burns*, 427 U.S. 347 (1976), for the proposition that the loss of constitutional freedoms constitutes irreparable injury. Plaintiffs' Memorandum at 6-7. This argument is, at best, an unprecedented broadening of the holding in *Elrod*. In *Elrod*, the Supreme Court held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373. Nowhere in *Elrod* did the Supreme Court hold that all alleged stitutional violations satisfy the irreparable harm requirement. In fact, the holding in *Elrod* is based upon the unique importance of the First Amendment. *Id.* Because the First Amendment is not in any way implicated in this case, *Elrod* does not control.

9. Another case cited by Plaintiffs, *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983), also deals specifically with First Amendment violation and, therefore, is not dispositive.

10. The Court finds no binding precedent to support Plaintiffs' proposition that irreparable harm will be presumed where any constitutional violation has been alleged. In fact, the Eleventh Circuit has foreclosed this possibility: "Plaintiffs also contend that a violation of constitutional rights always constitutes irreparable harm. Our case law has not gone that far, however." *Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000).

11. The Court in *Siegel* went on to hold that "[t]he only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." *Id.* Because this case, in which Plaintiffs seek to prevent the auction of certain snacks and other items at a convenience stores, does not implicate either of these rights, there can be no presumption of irreparable injury.

12. Plaintiffs have failed to show that their alleged injury cannot be undone through monetary compensation and, therefore, have failed to establish irreparable injury.

13. Once a Court finds that a plaintiff has failed to establish irreparable harm, the Court need not address the other prerequisites to a preliminary injunction, *see Church v. City of Huntsville*, 30 F,3d 1332, 1342 (11th Cir. 1994). However, the Court further finds that, even had Plaintiffs been able to

meet their burden of establishing irreparable harm, a preliminary injunction would still be inappropriate because Plaintiffs have also failed to clearly establish a substantial likelihood of success on the merits of their underlying case.

14. Court-appointed receivers enjoy judicial immunity for acts within the scope of their authority. *See, e.g., Henry v. Jefferson County Personnel Bd.*, 252 Fed App'x 308, 308 (11th Cir. 2007); *Property Management and Invest. Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985). Further, "[l]ike other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages . . . Accordingly, judicial immunity is not overcome by allegations of bad faith or malice. . . . " *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

15. Plaintiffs have made no showing, at this point in the litigation, of how they will clear the hurdle of judicial immunity. Because the alleged constitutional violations committed by Mr. Lambros were apparently done in his capacity as court-appointed Receiver for Cisco, there is a substantial likelihood that Mr. Lambros would be absolutely immune from suit. Plaintiffs have yet to show a substantial likelihood of success on the merits.

16. Because Plaintiffs have failed to establish both in the irreparable injury and the substantial likelihood of success requirements, they are not entitled to the extraordinary remedy of a preliminary injunction.

17. Even if Plaintiffs had carried their burden of establishing the four requirements for a traditional preliminary injunction, they would not be entitled to the particular injunction sought in this case. This is because the extraordinary remedy they seek in this case is one which would enjoin a state court proceeding. *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999) (holding that such an injunction is an "extraordinary remedy" that "invests a court with a power that is essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law."). *See also Chandler v. James*, 985 F. Supp. 1068, 1071 (M.D. Ala. 1997)("The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule.").

18. Recognizing the extraordinary significance of a Federal Court enjoining a state court proceeding, Congress has enacted the "Anti-Injunction Act", 28 U.S.C. §2283. Under that statute, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. §2283.

19. In this case, Plaintiffs assert that this Court is not prevented by the Anti-Injunction Act form enjoining the Camden County Superior Court, on the

ground that such an injunction is "necessary in aid" of this Court's jurisdiction over the instant case. Plaintiffs' Memorandum in Support of its Motion at 2. Do. No. 13. Specifically, Plaintiffs assert that "Defendant's motion in [the State RICO proceeding] is clearly an attempt to deprive this court of the ability to exercise its jurisdiction in the instant case and to so interfere with that jurisdiction as to make this Court's rulings unenforceable." *Id.*

20. In *Klay v. United Healthgroup, Inc.*, the Eleventh Circuit held that "[A] federal court injunction of state court proceedings is necessary in aid of jurisdiction when necessary 'to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.'" 376 F.3df 1092, 1103 n. 15 (11th Cir. 2004) (citing *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993)).

21. The Court in *Klay* went on to hold that the above rule is "limited to a state court's interference with a federal court's *past* consideration or disposition of a matter as embodied in an order or judgment, and [does] not extend to all ongoing matter." *Id.*

22. The Court in *Klay* distinguished *Wesch v. Folsom*, where it had held that enjoining a state proceeding was appropriate, noting that, in *Wesch*, "the federal court's power to enjoin the state proceeding was based on its need to protect its

judgment, not to protect its ability to rule prospectively in ongoing litigation." *Id.*

23. In this case, this Court has not yet considered or disposed of any matter in an order or a judgment. Therefore, the Court's power to enjoin the state proceeding here cannot be based on the Court's need to protect its judgment, as was the case in *Wesch*.

24. Instead, any injunction issued in this case would be to prospectively protect this Court's ability to rule in ongoing litigation, which was specifically foreclosed by the Eleventh Circuit in *Klay*.

25. In the present case, regardless of what ruling the state court makes regarding whether the auction will go forward, this Court will still retain jurisdiction over the matter filed in federal court. Federal jurisdiction over Plaintiffs' claim for money damages pursuant to Section 1983 will not disappear as a result of some state order.

26. Because Plaintiffs have failed to show that the injunction requested is expressly authorized by an Act of Congress, is necessary in aid of this Court's jurisdiction, or necessary to protect or effectuate this Court's judgments, the issuance of such an injunction would be prohibited by the Anti-Injunction Act, even had Plaintiffs established the four requirements for a traditional preliminary injunction.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, Plaintiffs' motion for temporary restraining order and preliminary injunction is hereby **DENIED**. Doc. No. 11.

SO ORDERED this 11th day of February, 2009.

s/ Lisa G. Wood
Judge, United States District Court
Southern District of Georgia

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-12547-FF

PATCO ENGERY EXPRESS, LCC,
Georgia Limited Liability Companies,
PATCO ENERGY EXPRESS II, LCC,
Georgia Limited Liability Companies,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Plaintiffs-Appellants,

versus

MICHAEL G. LAMBROS,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

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(March 23, 2010)

BEFORE: BLACK, BARKETT and COX, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by all appellants is **DENIED.**

ENTERED FOR THE COURT:

/s/ Judge E.R. Cox
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA
BRUNSWICK DIVISION

PATCO ENERGY EXPRESS, LLC,
PATCO ENERGY EXPRESS II, LLC, and
PATCO ENERGY EXPRESS III, LLC,
Georgia limited liability companies,

Plaintiffs,

v. Civil Action No.

MICHAEL G. LAMBROS,

Defendant.

COMPLAINT

I. JURISDICTION

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, federal question jurisdiction, because the claim in this action is based on 42 U.S.C. § 1983

II. PARTIES

2. The Plaintiffs, Patco Energy Express, LLC, Patco Energy Express II, LLC, and Patco Energy Express III, LLC ("Patco"), are

Georgia limited liability companies that own approximately $1,000,000 in inventory and property improvements, all located in the Southern District of Georgia, seized by the Defendant, acting under color of state law, without compensation and without an opportunity for Patco to be heard prior or subsequent to said seizure.

3. Michael G. Lambros ("Lambros") is a lawyer practicing in Atlanta, Georgia, who was appointed Receiver for Fairley Cisco ("Cisco") pursuant to the Georgia Racketeering Influence and Corrupt Organization Act (INSERT GEORGIA CITE), in the case of *State of Georgia v. Fairley Cisco, et al.*, Superior Court of Camden County, State of Georgia, Case No. 08V0302-SS2 (hereinafter "Ga. RICO action"). (A copy of the complaint in that case is attached hereto as Exhibit A). On January 13, 2009, Lambros seized Patco's inventory located at 491 St. Mary's Road, Kingsland, Georgia 35148, without compensation and without allowing Patco a prior or subsequent hearing. Lambros claimed to be acting under the authority of his appointment by the Superior Court of Camden County, Georgia and an order issued by that court on April 8, 2008. (A copy of the said order is attached hereto as Exhibit B). Patco is not now and never has been a party to the Ga. RICO action.

III. STATEMENT OF FACTS

4. On or about December 27, 2006, the real property located at 491 St. Mary's Road, Kingsland, Georgia, 5289 Laurel Island Parkway, Kingsland, Georgia, and 5369 Laurel Island Parkway, Kingsland, GA consisting of three truck stops-gasoline stations ("the Stations"), as well as certain property located in Simpson County, Kentucky, was sold by Cisco to Keldeep Sekhon ("Sekhon"), financed by Tennessee Commerce Bank headquartered in Nashville, Tennessee. The principals in this transaction were Fairley Cisco, acting under the names of Cisco Travel Plaza, Inc., Cisco Travel Plaza II, Inc., Cisco Oil, Inc., Cisco Express, Inc., and Cisco Enterprises, Inc., and Sekhon, acting under the name of United Fuel, Inc.

5. Prior to the sale of the Stations by Cisco to Sekhon, Cisco was operating the Stations as a criminal activity by setting the gas and diesel pumps at the Stations so that the pumps showed more gasoline and diesel being sold to the customers than they actually received. Sekhon continued this criminal enterprise after assuming control of the Stations from Cisco.

6. On or about March of 2008, Sekhon disappeared. A party calling itself Georgia Petro, LLC claimed to have bought Sekhon's interest in the Stations and Kentucky property

prior to his disappearance. A deed in the name of Georgia Petro was recorded in Camden County showing ownership of the Stations and the Kentucky property in Georgia Petro.

7. Anjay Patel was approached by representatives of Georgia Petro, who retained the Patel family represented by Anjay Patel in May, 2008 to take over the operation of the Stations. Prior to Georgia Petro retaining the Patels, the Defendant, Lambros, appointed by the Supreme Court of Camden County Georgia in the Ga. RICO case as Receiver for Defendant Fairley Cisco, attempted, unsuccessfully, to operate the Stations as an asset of Fairley Cisco. The Stations eventually ceased selling gasoline and diesel fuel and were not selling gasoline or diesel fuel at the time the Patels arrived in Georgia to operate the Stations for Georgia Petro. The Patels nevertheless agreed to operate the Stations. They formed Patco Energy Express, LLC to operate the largest Station. They formed Patco Energy Express II, LLC and Patco Energy Express III, LLC to operate the two smaller Stations. Because the Stations were closed when Patco began operating them, it was first necessary to obtain electricity for which Patco posted a deposit of $60,000. The Georgia Department of Agriculture after discovering the criminal activities of Cisco and Sekhon refused to allow gasoline and diesel fuel to be sold at the Stations. Patco paid $100,000 of a $500,000 fine

imposed on Georgia Petro by the Georgia Department of Agriculture and obtained its permission to begin selling gasoline and diesel at the Stations.

8. A copy of the Georgia Petro and Patco agreement with the Georgia Department of Agriculture is attached hereto as Exhibit C. Patco further purchased the inventory located in the Stations from Georgia Petro and brought in additional inventory to sell at the Stations. Patco signed a lease with Georgia Petro to operate the Stations and an option to purchase the Stations from Georgia Petro.

9. The Tennessee Commerce Bank agreed on June 30, 2008 to sell Patco the first mortgage, promissory notes, and other debt obligations of United Fuel, Inc. and Keldeep Sekhon. The bank asked Patco for a good faith deposit of $150,000 on this purchase. Patco paid this money to Tennessee Commerce Bank as a good faith deposit in exchange for the bank's promise to sell to Patco.

10. However, without further notice to Patco, Tennessee Commerce Bank broke its agreement to sell to Patco and instead sold the mortgage, promissory notes, and other debt instruments on the Stations and the Kentucky property to a Mr. Nicholson. Patco was informed by Mr. Nicholson that he would in turn sell the mortgage, promissory notes, and other debt instruments less the Kentucky property and certain property near the Stations for $18,000,000, a substantial profit for him. An Agreement was executed with Mr. Nicholson on June 30, 2008. By this time, Georgia Petro had disappeared and was no longer claiming ownership of the Stations. Mr. Nicholson agreed to allow Patco, Patco II, and Patco III to remain at the Stations during his sufferance.

11. On or about September 2, 2008, Lambros foreclosed the second mortgage on the property from United Fuel, Inc. and Sekhon to Fairley Cisco. None of Fairley Cisco, Georgia Petro or Lambros has ever paid a dime on the first mortgage and accompanying note to the Tennessee Commerce Bank. However, Patco paid $120,000 per month on the first mortgage for the period July through October, 2008. This money was paid to Nicholson who, in turn, paid a part of it to the Tennessee Commerce Bank per Nicholson's agreement with the bank as the amount required to keep the first mortgage current.

12. On October 30, 2008, Lambros wrote Patco the letter attached hereto as Exhibit D demanding that Patco deliver immediate possession of the Stations to Lambros. This was the first time that any demand for possession of the Stations had been made by Lambros.

13. Patco thereafter informed Nicholson that it would not continue to make payments due to the threat of Lambros to take immediate possession of the property. Nicholson has not foreclosed the first mortgage on the Stations despite said mortgage being in arrears.

14. On January 5, 2009, representatives of Patco, Patco II, Patco III, and their counsel met in Atlanta, Georgia with Lambros and his counsel in an effort to resolve the issues between them. Lambros demanded payment of $2,000,000 by Patco as the price for allowing Patco to retain possession of the Stations. The payment of $2,000,000, the payment of attorneys' fees necessitated in large part by Lambros, and the payment of related expenses made the Stations unprofitable for Patco to operate. However, Patco sought to negotiate a management contract for the Stations with Lambros, but this was rejected by Lambros out of hand. Therefore, Patco agreed to turn over to Lambros possession of the Stations.

15. On January 10, 2009, Patco and the Patels closed the Stations and turned the keys over to the Camden County District Attorney, the plaintiff in the Georgia RICO action, for delivery to Lambros.

16. Lambros, citing his status as Fairley Cisco's Receiver appointed by the Superior Court of Camden County and the powers allegedly granted him by the court in an April 8, 2008 injunction, seized the inventory that Patco had purchased and placed in the Stations. The inventory is the property of Patco. Attached hereto as Exhibit E is a letter dated January 7, 2009 from one of Lambros' counsel, Mr. Kennedy, warning the Plaintiffs that they were not to remove any of the inventory or any of the improvements they had placed on the property. The injunction relied on by Mr. Lambros authorized him to obtain the assistance of law enforcement officers in carrying out and enforcing his commands. During the week preceding January 13, 2009, the local police under the direction of Mr. Lambros visited the premises several times.

17. Plaintiff requested Lambros to provide the basis on which he had seized Plaintiff's inventory and improvements. Mr. Lambros has not responded.

18. Plaintiff was not given a hearing prior to the seizure of its inventory and improvements nor provided with a hearing subsequent to the seizure of said property. Plaintiff is not and never has been a party to the Georgia RICO action in which Mr. Lambros was appointed as Receiver. Approximately 80% of the seized property is perishable. The value of the seized property is approximately $800,000, and the value of the improvements is approximately $180,000.

CAUSES OF ACTION
COUNT ONE

19. Plaintiff adopts all of the allegations of this Complaint as a part of this Count One as if fully set out herein.

20. Plaintiff claims damage of the Defendant in the amount of $1,000,000 compensatory damages, and $10,000,000 punitive damages in that the Defendant was acting under color of state law as a Receiver appointed by the Camden County Superior Court and supported in his activities by a court order prohibiting any interference with the Defendant or any suit against the Defendant except to the extent the Defendant acted in bad faith. The Plaintiff alleges that the Defendant acted in bad faith in seizing Plaintiff's inventory and improvements in that he knew, or in the exercise of reasonable judgment would have

known, that he had no legal ground to seize the Plaintiff's property and was violating Patco's constitutional rights in doing so, but did so anyway. The foregoing is a violation of Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff claims that the Defendant is liable under 42 U.S.C. § 1983 to pay damages, the costs of Court, and attorneys' fees.

COUNT TWO

21. Plaintiff adopts all of the allegations of this Complaint as a part of this Count Two as if fully set out herein.

22. The Plaintiff alleges that the Defendant acted in bad faith in seizing Plaintiff's inventory and improvements in that he knew, or in the exercise of reasonable judgment would have known, that Plaintiff was entitled to a pre-seizure hearing and a post-seizure hearing regarding the seizure of Plaintiff's property. These rights are constitutional rights conferred by the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff claims that the Defendant is liable under 42 U.S.C. § 1983 to pay to Patco damages, the costs of Court, and attorneys' fees.

COUNT THREE

23. Plaintiff adopts all of the allegations of this Complaint as a part of this Count Three as if fully set out herein.

24. Plaintiffs aver that Defendant has wrongfully and illegally converted Patco's property and deprived Patco of the use and benefit of its property. Plaintiff claims of the Defendant damages in the amount of $1,000,000 compensatory and $10,000,000 punitive, plus attorneys' fees and costs.

s/ William Eugene Rutledge
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P*ro Hac Vice* Admission
contemporaneously with this
complaint

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PLAINTIFFS HEREBY DEMAND TRIAL BY STRUCK JURY.

OF COUNSEL

CASE NO.: 09-12547FF

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PATCO ENERGY EXPRESS, LLC, et al.,

APPELLANTS,

vs.

MICHAEL G. LAMBROS,

APPELLEE.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA
BRUNSWICK DIVISION
2:09-cv-00004

PETITION FOR PANEL REHEARING

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OTHER:

Ga. Constitution 1983, Art. I, Sec. II, Par. V 7

Come now the Appellants, Patco Energy Express, LLC, Patco Energy Express II, LLC, and Patco Energy Express III, LLC ("Patco"), and move the Panel to grant rehearing in this case because of errors in the Opinion which make it fatally effective.

CORRECT STATEMENT OF FACTS

The Court stated the facts in this case in abbreviated form, but left out a number of relevant facts that are needed to illustrate the errors in the Opinion. The following facts are recommended for this purpose.

The district court resolved this case on a motion to dismiss. The complaint alleged in relevant part as follows. (Doc. 1).

On April 9, 2008 Lambros was appointed as the pre-judgment *in personam* receiver for the various defendants in the case of *State of Georgia v. Cisco et al.*, Superior Court of Camden County, Georgia, Case No. 2008CV0302-SS2, an action brought under the Georgia civil RICO statutes, O.C.G.A. §§ 16-14-1, *et seq.* (Doc. 1-3 at 2-14). Count Three of the complaint in the *Georgia v. Cisco* case sought a judicial appointment of a prejudgment receiver. (Doc. 1-2 at 14). The order appointing Lambros specifically provided that Lambros would be personally liable for actions taken "recklessly" or

"in bad faith". Patco were not parties to the case at any time. (Doc. 1-3 at 12).

On December 27, 2006, the real property located at 491 St. Mary's Road, Kingsland, Georgia, 5289 Laurel Island Parkway, Kingsland, Georgia, and 5369 Laurel Island Parkway, Kingsland, GA consisting of three truck stops-gasoline stations ("the Stations") as well as certain property located in Simpson County, Kentucky, was sold by Cisco to Sekhon. The civil RICO complaint charged that prior to the sale of the Stations by Cisco to Sekhon, Cisco was engaged in criminal activity by setting the gas and diesel pumps so the pumps showed more fuel sold to customers than they actually received. Sekhon was charged with continuing this criminal enterprise after assuming control of the Stations. (Doc. 1 at 3).

In March of 2008, Sekhon disappeared. A party calling itself Georgia Petro, LLC claimed to have bought Sekhon's interest in the Stations and Kentucky property prior to his his disappearance. A deed in the name of Georgia Petro was recorded in Camden County, Georgia. (Doc. 1 at 3).

The managing member of Patco was approached in May of 2008 by Georgia Petro to take over the operation of the Stations. The Georgia Agricultural Department ordered no

gasoline or diesel fuel sales. Patco posted a deposit of $60,000 to get electricity at the Stations. Patco paid $100,000 of a $500,000 fine imposed on Georgia Petro by the Georgia Department of Agriculture and agreed to pay $150,000 for full discharge of the fine. Patco purchased **the inventory** at the Stations and brought in more inventory. Patco signed a triple net lease and lease-purchase on the Stations. (Doc. 1 at 4).

On September 2, 2008, Lambros foreclosed a $4,000,000 second mortgage on the Stations and filed the deed in October of 2008.

On October 30, 2008, Lambros wrote Patco stating he now owned the Stations and demanded that Patco deliver immediate possession to him. Lambros demanded payment to him of $2,000,000.00 as the price for Lambros "allowing" Patco to retain possession of the Stations. The demanded payment of $2,000,000.00 would have made the Stations unprofitable for Patco to operate. On January 10, 2009, Patco closed the Stations and turned the keys over to the Camden County District Attorney. Lambros seized the inventory in the Stations when they were closed and the improvements that Patco had made to the Stations. The inventory is the property of Patco. Patco was not given a hearing prior to the seizure of their inventory and improvements nor

provided with a hearing subsequent to the seizure of said property. Patco is not and never has been a party to the Georgia RICO action in which Lambros was appointed as Receiver. The value of the seized property is approximately $800,000, and the value of the improvements is approximately $180,000. (Doc. 1 at 7).

Lambros stated at the hearing on the preliminary injunction that he seized the inventory for past due rent on the Stations.

Q. What debt is it that you contend is owed to you by the PATCO entities?

A. At that time the debt would have been most likely the failure to pay any rent.

Q. Pardon me now. I do not know what you mean by most likely but what was the debt that Mr. Walker was referring to in this letter on your behalf that he was trying to collect?

A. I assume rent. I assume rent.

Q. What do you mean you assume it?

A. Because I don't know any other explanation sitting here today so I assume that it is rent.

(emphasis supplied) (Tab C at 18, ll. 5-16).

Patco was not a party to the *Georgia v. Cisco* case. Lambros admitted that he did not file the motion for permission to sell Patco's personal property until after he knew this federal case had been filed.

Q. At the time you filed that motion –
A. Yes, sir.
Q. -- you knew this case was pending, correct?
A. Yes.
(Tab C at 33, ll. 9-12).

On cross examination, Lambros testified that Patco was in the Stations pursuant to a triple net lease with the "Abraham Defendants" (Georgia Petro).

Q. What is your understanding of the basis on which Patco occupied the premises, which I will call the truck stops? Was there a lease?
A. ...The court ruled that what we have been commonly referring to as the Abraham Defendants in that case, the injunction was - Abraham Defendants were released

from the injunction. It wasn't converted to a preliminary injunction so these stations went back to the Abraham Defendants and they're Georgia Petro entities is what they were called. And so the real properties were titled or held by the Abraham Defendants so the stations were given back to Abraham after April 8th. In looking at the documents what happened Your Honor is in May of 2008 the Abraham Defendants and the Patco folks entered into three triple net leases for the three different stations and Patco entities were leasing from the Abraham entities and I think the rental rate –

(Tab C, p. 34, l. 7 - p. 35, l. 1).

A. Patco had a triple net lease agreements with the Abraham Defendants. Patco did not have a lease agreement that - those lease agreements, my understanding, did not survive the foreclosure.

(Tab C, p. 35, l. 22 - p. 36, l. 4).

When the foregoing facts are considered, they show that the Abraham parties were owners of the Stations and were released from the appointing order and the court's control; Patco entered into leases and lease purchase agreements with the Abraham Parties under which they lawfully occupied the Stations; Lambros claimed back rent was due to him from

Patco after he foreclosed the second mortgage; and he seized Patco's personal property to pay for the alleged rent without any hearing before or after the seizure. These facts must be accepted to properly decide this appeal for the reasons stated below.

ARGUMENT

INTRODUCTION

The Opinion of the Panel fails to correctly state the facts of the case and fails to correctly state the law as to the status of the Appellee Lambros as receiver between the time of his appointment and the Georgia Supreme Court decision in *Cisco v. Georgia*, 285 Ga. 656, 680 S.E. 2d 831 (2009), declaring the statute under which he was appointed unconstitutional. The Panel further failed to note or discuss the fact that in

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the appointing order the court appointing Appellee provided for a blanket right for the receiver to be sued thus making it unnecessary to obtain the permission of the appointing court each time the receiver was sued. Finally, the Panel failed to find that this case falls squarely within the *ultra vires* exception to the *Barton* doctrine even though it does.

ERRORS OF LAW

The Court erroneously states, "Whether or not the *Cisco* decision affects Lambros's status as receiver, it is not relevant to this appeal. When Lambros committed the acts of which Patco complains, when Patco filed this lawsuit, and when the district court dismissed this case, Lambros was a duly appointed receiver. Nothing in the *Cisco* case relieves Patco of the duty to seek leave from the appointing court before filing suit against Lambros in a second court." (Opinion at 5).

These statements **are absolutely wrong**. The law of Georgia and of the United States is that any act done pursuant to a statute subsequently declared unconstitutional is void and as if the act had never been done. Lambros has **never** been a duly appointed receiver because *Cisco v. Georgia* declared unconstitutional the statute under which he was supposedly appointed.

A. The Appellee Was Never a Duly Appointed Receiver

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The law of Georgia is clear that an unconstitutional statute is void and as if it never

existed. In *Wellborn v. Estes*, 70 Ga. 390 (1883), the court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The Constitution of Georgia, 1983, Art. I, Sec. II, Par. V declares that **"Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them."** (emphasis supplied). Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. *Jordan v. Franklin*, 131 Ga. 487, 62 S.E. 673, 673 (1908); *Worth County v. Crisp County*, 139 Ga. 117, 76 S.E. 747, 747-748 (1912); *James v. Blakely*, 143 Ga. 117, 84 S.E. 421, 432-433 (1915); *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 797, 120 S.E. 120 (1923). See also *State Highway Department v. H.G. Hastings Co.*, 187 Ga. 204, 215, 199 S.E.2d 793 (1938); *Tarpley v. Carr*, 204 Ga. 721, 727, 51 S.Ed.2d 638 (1949) (City officers were not *de facto* officers of office created under an unconstitutional charter);[1] *Franklin v. Harper*, 205 Ga. 779, 784, 55 S.E.2d 221 (1949); *Baggett v. Linder*, 208 Ga. 590, 591, 68 S.Ed.2d 469 (1952); *Milan v. Adams*, 216 Ga. 440, 444, 117 S.E.2d 343 (1960); *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 787, 125 S.Ed. 2d 207 (1962) ("...the remedy provided in the ordinance is not even law if the

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[1] *Tarpley* establishes that Lambros was no receiver in this case, *de facto, de jure*, or otherwise.

petitioner's constitutional attack is sustained."); *Dobson v. Brown*, 225 Ga. 73, 76, 166 S.Ed 2d 22 (1969) ("'Not even estoppel can legalize or vitalize that which the law declares unlawful and void.'"); and *Mapp v. First Georgia Bank, et al.*, 156 Ga.App. 380, 274 S.E.2d 765 (1980). The foregoing authorities are overwhelmingly in favor of the proposition that the appointment of Lambros as a receiver was a legal nullity.

An unconstitutional statute, though having the form, features, and name of law, is in reality no law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, **and affords protection to no one**. *Norton v. Shelby County*, 118 U.S. 425, 442-443, 6 S.Ct. 1121, 30 L.Ed. 178 (1888); *Ex parte Siebold*, 100 U.S. 371, 376, 25 L.Ed. 717 (1879); *McCants v. Layfield*, 149 Ga. 231, 238, 99 S.E. 877 (1919). The effect of *Georgia v. Cisco* is to nullify any appointment of Lambros as a receiver. He was never a duly appointed receiver.

Therefore, the effort of this Panel to give the unconstitutional appointment of Lambros as a receiver legal status and life even long enough to require that he be treated as a receiver for

"permission to sue" purposes is misplaced and wrong.

B. <u>The State Court Appointing The Receiver Gave Permission For Him To Be Sued</u>

The appointing order naming Lambros as receiver stated as follows:

> Michael G. Lambros, Esq., an attorney-at-law and a member of the State Bar of Georgia, is appointed to act as receiver (the "Receiver"), **with full power of an equity receiver** under the laws of Georgia, for the "Enjoined Defendants". (emphasis supplied) (Exhibit A, § 4, p. 5).

The appointing order provides that the receiver "has the power to defend, compromise or adjust or otherwise dispose of any and all suits, actions or proceedings **instituted against the Receiver** or against any of the Enjoined Defendant (sic)." (*Id.* at 7). This language clearly states that the receiver may be sued without further permission. Otherwise, there would be no need to grant him such power to defend suits brought against him in advance of specific requests to sue.

The relevant Georgia law with regard to the appointment of equity receivers and their powers and authority clearly limits the powers and immunities of Georgia **equity receivers** to the powers and immunities listed in the appointing order. Consider the following Georgia statutes:

> O.C.G.A. § 9-8-2. Protection of property in danger of destruction and loss Equity may appoint receivers to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.
>
> O.C.G.A. § 9-8-3. Appointment, in order to protect assets of debtor; notice; discretion as to terms
> Equity may appoint a receiver to take possession of and hold, *subject to the direction of the court*, any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested. Under extraordinary circumstances, a receiver may be appointed before and without notice to the trustee or other person having charge of the

> assets. *The terms on which a receiver is appointed shall be in the discretion of the court.* (emphasis supplied).
>
> O.C.G.A § 9-8-8. Receiver as officer of court; removal of receiver
> (a) The receiver is an officer and servant of the court appointing him, *is responsible to no other tribunal than the court, and must in all things obey its direction.*
> (b) The receiver shall discharge his trust *according to the orders or decrees of the court appointing him.* He is at all times subject to its orders and may be brought to account and removed at its pleasure. (emphasis supplied).

Therefore, even if Lambros had been constitutionally appointed, which he was not, he was not immune from suit because the appointing order provided that he could be sued and gave him the power to defend and resolve such cases.

THIS CASE IS AN EXCEPTION TO THE *BARTON* DOCTRINE

The Panel acknowledges that there is an exception to the *Barton* Doctrine permitting suits against receivers without the appointing court's permission where the receiver is engaged in acts or transactions "in carrying on the business connected with such property." (Opinion at 4-5). But, the Opinion states, "This exception contemplates actions redressing torts committed in furtherance of the debtor's business." The Panel cites *Carter v. Rogers*, 220 F.3d 1249, 1254 (11th Cir. 2000). *Rogers* does not hold that **only** dealing with torts on the property comes within an exception to the *Barton* rule. That is merely an example. But, if it did hold that the exception was so limited, the holding would be contrary to *Barton* itself.

The federal courts have subject matter jurisdiction even though this case was brought against a court-appointed receiver without the appointing court's permission because Patco alleges that the receiver wrongfully took possession of property belonging to another. Under the Supreme Court's decision in *Barton v. Barbour,* 104 U.S. 126, 127 (1888), "[i]t is a general rule that before suit is brought against a receiver leave of the court by which [the receiver] was appointed must be obtained." 104 U.S. 126, 128, 26 L.Ed. 672 (1881). However,

Barton also makes it clear that "if, by mistake or wrongfully, the receiver takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting *ultra vires*." *Id.* at 134. This case falls squarely within this *ultra vires* exception to the *Barton* doctrine because Patco is alleging that Lambros wrongfully seized its assets rather than the assets. Accordingly, the federal courts have subject matter jurisdiction.

Therefore, this case **does come** within an exception to the *Barton* Doctrine.

CONCLUSION

The appointment of Lambros as a receiver was void and as though it had never happened because he was appointed pursuant to a statute later declared unconstitutional. He was, under the law of the State of Georgia and the United States, never a duly appointed receiver. He was not a duly appointed receiver when he seized Patco's inventory; he was not a duly appointed receiver when this suit was filed; he was not a duly appointed receiver when the district court dismissed this case; and he was not a duly appointed receiver when the district court erroneously denied the motion for preliminary injunction. Unless this Court is prepared to overrule the longstanding rule of state and

federal law that prohibits action taken under a statute later declared unconstitutional, it must reverse this case. Moreover, the appointing court gave permission for this receiver to be sued. But, even if none of the foregoing were true, this case is an exception to the *Barton* Doctrine under the *ultra vires* exception.

Respectfully submitted,

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COUNSEL'S CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that this brief was typed in Times Roman 14 and does not exceed 15 pages in length.

s/ William Eugene Rutledge
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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of December, 2009, electronically filed and electronically served two copies of the foregoing on counsel for all parties by e-mail, and by placing a copy of same in the United States mail on December 1, 2009, properly addressed and first-class postage prepaid, to:

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OF COUNSEL

Supreme Court of Georgia.
CISCO
v.
STATE of Georgia.
Moore et al.
v.
State of Georgia.
Nos. S09A0371, S09A0375.

June 15, 2009.
Reconsideration Denied June 30, 2009.

HUNSTEIN, Presiding Justice.

These cases involve the constitutionality of the in personam forfeiture provision, OCGA § 16-14-7(m), in the Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act, OCGA § 16-14-1 et seq. (the "RICO Act"). The Camden County District Attorney in the name and on behalf of the State of Georgia filed an in personam RICO forfeiture complaint against defendants Althea Moore, Tammy Walker and their father, Fairley Cisco, along with nine other individuals and twelve businesses, who are the current or former owners, officers or operators of three truck stops in south Georgia.2 In the complaint, the district attorney alleged that "the fuel pumps at said [truck stops] were intentionally altered by [d]efendants to indicate that customers were receiving a larger quantity of gasoline or diesel fuel than was actually dispensed"; that defendants

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2 The complaint also included in rem forfeiture proceedings against the three truck stops.

"represented to customers that they were receiving premium grade gasoline while in fact they were receiving a lower octane gasoline"; and that "[d]efendants have operated said [truck stops] as a continuous enterprise through a pattern of criminal activity including fraud and theft." Asserting that "[t]he above-listed defendants in personam individually ... constitute an 'enterprise' as that term is used in [the RICO Act]," the district attorney alleged that defendants "conducted or participated in the affairs of 'The Enterprise' through a 'pattern of racketeering activity' ... consisting of the following predicate acts," which, among the matters itemized by the district attorney, include the criminal acts of theft by deception and theft of services in violation of OCGA § 16-8-1 et seq.3 and the unauthorized use of financial transaction cards in violation of OCGA § 16-9-33.

It is uncontroverted that not one of the in personam defendants had been convicted of or was even indicted either for committing any of the alleged crimes set forth as "predicate acts" in the Camden County District Attorney's complaint or for committing the offense of engaging in racketeering activity in violation of OCGA §16-14-4.

After an ex parte hearing conducted the same day the complaint was filed, the trial court entered a temporary restraining order as to all of defendants' assets and appointed a receiver to take complete and immediate possession of and control over all of

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3 The offense of theft by deception is set forth in OCGA § 16-8-3; the offense of theft of services is set forth in OCGA § 16-8-5.

defendants' assets and property, without limitation, including the power to freeze all bank and securities accounts; possess and control all books and records of any entity in which defendants had a direct or indirect interest; and review defendants' records and reports of transactions. Additionally, defendants were ordered to cooperate with the receiver and provide him, inter alia, with "all information requested relating to [defendants'] past and present operations, activities and conditions (financial, legal, or otherwise)."

All of the defendants filed motions to dismiss challenging the constitutionality of the in personam RICO forfeiture provision, OCGA § 16-14-7(m). After entering an order that superseded the TRO but imposed in its stead a preliminary injunction and maintained the appointment of the receiver, the trial court rejected the constitutional challenges to OCGA § 16-14-7(m). In its amended order setting forth the reasons for its denial, the trial court relied on OCGA § 16-14-7(a) ("[f]orfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding") and id. at (b) ("[a] RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the 'Georgia Civil Practice Act' "), see also id. at (i) (same), to conclude that "the [RICO] Act contains sufficient safeguards to protect a defendant's rights and property so that an *in personam* action may be pursued without running afoul of the Constitution." Tammy Walker, Althea Moore and several of the businesses appeal this ruling in Case No. S09A0375; Fairley Cisco appeals in Case No. S09A0371. We granted appellants' motion to consolidate their

appeals.

[1] This is the first time since 2001 that any appellate court has been presented the opportunity to address OCGA § 16-14-7(m).4 In *Pimper v. State of Ga.*, 274 Ga. 624, 555 S.E.2d 459 (2001), the majority recognized there were "well-grounded concerns regarding the constitutional ramifications of an in personam RICO forfeiture action" such as the one raised in that case, but deemed it necessary to dismiss the appeal without reaching the merits. Id. at 627, 555 S.E.2d 459. No such procedural bar, however, exists in this case. For the reasons that follow, we conclude that OCGA § 16-14-7(m) provides for criminal in personam forfeiture prior to indictment or conviction; that an in personam forfeiture defendant must accordingly be afforded all of the constitutional safeguards due a criminal defendant; that Georgia's civil procedure rules, which OCGA § 16-14-7(m) expressly utilizes, are not adequate to protect an in personam forfeiture defendant's constitutional rights; and that, therefore, OCGA § 16-14-7(m) is unconstitutional because it deprives in personam forfeiture defendants of the safeguards of criminal procedure guaranteed by the United States and Georgia Constitutions.

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4 The only case since *Pimper v. State of Ga.*, 274 Ga. 624, 555 S.E.2d 459 (2001) to reference OCGA § 16-14-7(m) was *Walker v. State of Ga.*, 281 Ga.App. 526, 636 S.E.2d 705 (2006), which carefully explained that the forfeiture proceeding in that case was in rem, not in personam. Id. at 529-530, 636 S.E.2d 705.

1. Appellants contend that OCGA § 16-14-7(m) provides for criminal in personam forfeiture. We agree. Subsection (m) consists entirely of the following sentence:

> In lieu of the provisions [regarding in rem forfeiture proceedings], the state may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this Code section.

We recognize that subsection (a) of OCGA § 16-14-7 states that a RICO forfeiture proceeding under that statute, i.e., in rem and in personam forfeitures, "shall be had by a civil procedure," and that the proceeding is governed by the Georgia Civil Practice Act, OCGA § 9-11-1 et seq. ("CPA"), with certain delineated exceptions. OCGA § 16-14-7(b), (i). Contrary to appellee's assertion, however, this statutory language does not mandate the conclusion that in personam RICO forfeitures are civil proceedings. The law is well established that a legislature's description of a statutory proceeding as civil does not foreclose the courts from determining that the proceeding is so punitive in fact that it may not legitimately be viewed as civil in nature, despite the legislature's intent. See *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); *United States v. Ursery,* 518 U.S. 267, 278, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). See also *Dept. of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 777, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) ("legislature's description of a statute as civil does not foreclose the possibility that it has a

punitive character") (footnote omitted). Thus, "[e]ven in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' [cit.], as to 'transfor(m) what was clearly intended as a civil remedy into a criminal penalty.' [Cit.]" *Hudson,* supra.

[2] In order to determine whether the in personam RICO forfeiture proceeding is civil, as OCGA § 16-14-7(a) states, or criminal in nature, we utilize the factors set forth in *Hudson v. United States,* supra, 522 U.S. at 99-100, 118 S.Ct. 488.5 We need not address all seven *Hudson* factors, however, because we determine that the criminal nature of the in personam RICO forfeiture proceeding in OCGA § 16-14-7(m) is overwhelmingly established by the second factor in *Hudson,* namely, " 'whether [the sanction] has historically been regarded as a punishment,' " id, and further reinforced by the third and fifth factors, namely, whether the punishment comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime. Id.

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5 Those factors are (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id.* 522 U.S. at 99-100, 118 S.Ct. 488

[3] The United States Supreme Court has recognized that civil asset forfeiture, with its biblical roots and common law development in medieval England, has for centuries been an in rem proceeding against property, operating under the legal fiction that the seized property, and not the property's owner, is the guilty party. See *United States v. Bajakajian,* 524 U.S. 321, 330 and n. 5, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 680-682, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). Hence, the physical object itself is " 'treated as the offender,' without regard for the owner's conduct." Id. at 684, 94 S.Ct. 2080. However, where the forfeiture was in personam, literally "against the person," Black's Law Dictionary, p. 711 (5th ed.), the proceeding was criminal because it required proof of the guilt of the owner. As the United States Supreme Court recognized in *The Palmyra,* 25 U.S. 1, 6 L.Ed. 531, 12 Wheat. 1 (1827), a forfeiture in personam is a "personal penalty," id. at 14, such that a "proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam.*" Id. at 15. Thus, unlike in rem forfeiture of guilty property, which descends from one historical tradition, in personam forfeitures are criminal forfeitures "from a different historical tradition: ... Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law. [Cits.]" *United States v. Bajakajian, supra* at 332, 118 S.Ct. 2028 See also *United States v. One 1976 Mercedes Benz 280S,* 618 F.2d 453, 454 (7th Cir.1980) (historically, forfeiture is civil proceeding in rem that permits

condemnation of property without regard to the owner's culpability by treating a vehicle or other inanimate object "as being itself guilty of wrongdoing, regardless of its owner's conduct"); Stahl, Criminal Law: Asset Forfeiture, Burdens of Proof and the War on Drugs, 83 J.Crim. L. & Criminology 274(II)(F) (1992) (historically, in personam forfeiture actions against owners of property treated as criminal in nature because issue is personal guilt or innocence of owner and forfeiture becomes punishment of that individual).

> The distinguishing characteristics of a criminal forfeiture provision [are] that, unlike the in rem character of civil forfeiture ([cit.]), the personal guilt of the defendant is at issue. [Cits.] That is to say, given the in rem character of civil forfeiture "questions relating to the culpability of the owner of the goods were simply not an issue. It was the goods which were proceeded against, not the owner." [Cit.] The theory of criminal forfeiture is, of course, wholly different inasmuch "as they 'are in personam.' ... As such these provisions operate as an additional penalty against the defendant. ..." [Cit.]

(Footnote omitted.) *United States v. Veon,* 538 F.Supp. 237, 242 (E.D.Cal.1982).

The overwhelming weight of this country's jurisprudence establishes by the clearest proof that in personam forfeitures of assets are criminal proceedings grounded upon the culpability of the owner of the property and instituted for the purpose

of punishing the owner for an offense. See generally *Hudson v. United States,* supra, 522 U.S. at 100, 118 S.Ct. 488. The only appellate opinion in this country that has been brought to our attention in which an in personam forfeiture was deemed to be a civil proceeding is *Arizona v. Gravano,* 210 Ariz. 101, 108 P.3d 251 (Ariz.App.2005). The in personam RICO forfeiture proceeding discussed in that case was initiated pursuant to A.R.S. § 13-2314, which requires that state's attorney general or a county attorney to act "on behalf of" a private person in bringing a civil RICO action. Id. at (A). The Arizona statute is thus comparable to OCGA § 16-14-6, which sets forth "[a]vailable civil remedies" for RICO violations which may be pursued by "[a]ny aggrieved person," id. at (b), although, unlike OCGA § 16-14-6, the Arizona statute includes as a civil remedy the option of a civil asset forfeiture.6 A.R.S. § 13-2314(D), (E). A RICO forfeiture proceeding is not an available avenue for Georgia's aggrieved citizens but is a proceeding that can only be initiated by the State pursuant to OCGA § 16-14-7.7 Accordingly, the

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6 The only forfeiture allowed under OCGA § 16-14-6 is the forfeiture of a Georgia corporation's charter upon a finding that its board of directors or managerial agent acted in violation of OCGA § 16-14-4. See OCGA § 16-14-6(a)(6).

7 See OCGA § 16-14-7(m) ("the *state* may bring an in personam action"); id. at (n)(1) (title to any forfeited property to be put in the name of the State); id. at (*l*) (net proceeds of any sale or disposition of forfeited property to be divided as directed among certain governmental entities). See also id. at (d) (requiring in rem RICO forfeiture proceedings to be brought by district attorney).

county attorney's involvement in *Arizona v. Gravano* was not in his capacity as his county's prosecutor but only as a legally required substitute for a private individual pursuing civil remedies against persons against whom a racketeering claim has been asserted. Thus, pretermitting whether the Arizona Court of Appeals properly analyzed the issue before it, we find *Arizona v. Gravano* distinguishable based on the marked differences between our statutory schemes.8

The criminal nature of the in personam RICO forfeiture proceeding appellee has brought against appellants is also established by the statutory requirements for bringing such a proceeding and by the specific facts of this case. Under OCGA § 16-14-7(a), the only property subject to forfeiture is that "used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity." Unlike the in rem RICO forfeiture proceeding against *property* involved in racketeering activity, which may be pursued without regard to the guilt or innocence of the property owner, see *Walker v. State of Ga.*, 281 Ga.App. 526(1), 636 S.E.2d 705 (2006) (in in rem forfeiture, property is the "offender" and nothing suggests personal liability of owner), the entire purpose of the in personam RICO forfeiture proceeding is to target a property owner to whom the innocent-owner defense does not apply, i.e., an owner who has engaged in "an interrelated pattern of

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8 Moreover, we note that, in that case, the civil RICO proceeding was instituted four months *after* the forfeiture defendants were arrested on criminal charges.

criminal activity motivated by ... pecuniary gain." OCGA § 16-14-2(b). Because "[t]he interest of an innocent party in the property shall not be subject to forfeiture," OCGA § 16-14-7(j), an in personam RICO forfeiture defendant cannot meet the definition of an "innocent party" unless he or she "did *not* have actual or constructive knowledge that the property was subject to forfeiture." (Emphasis supplied.) Id. Thus, the punishment imposed by the forfeiture of an in personam RICO forfeiture defendant's property " 'comes into play only on a finding of *scienter,*' " *Hudson v. United States,* supra, 522 U.S. at 99, thereby establishing under the third factor that OCGA § 16-14-7(m) is criminal in nature.

Turning to the fifth factor in *Hudson v. United States,* supra, 522 U.S. at 99, 118 S.Ct. 488 (" 'whether the behavior to which [the punishment] applies is already a crime' "), it is uncontroverted that the only behavior to which an in personam RICO forfeiture proceeding applies must necessarily constitute a crime, given the definition of racketeering activity in OCGA § 16-14-3(9)(A) ("racketeering activity" means "to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit" any of dozens of enumerated crimes) and the requirement that "at least two acts of racketeering activity" be engaged in so as to establish a "pattern of racketeering activity." Id. at (8)(A). Accordingly, the statutory language likewise establishes the criminal nature of the forfeiture punishment imposed by OCGA § 16-14-7(m) under the fifth factor in *Hudson v. United States,* supra, 522 U.S. at 99, 118 S.Ct. 488.

The facts in this case also reveal the criminal nature of the proceedings appellee brought against appellants. Although these proceedings are predicated upon an alleged manipulation of gasoline pumps at the three South Georgia truck stops, a matter that directly concerns the Department of Agriculture, the governmental authority charged with oversight of gasoline pumps and their accuracy, see OCGA § 10-1-155 et seq.; see also Ga. Comp. R. & Regs. Rules 40-20-1-.11, 40-20-1.13, the only involvement in these proceedings of officials with the Department of Agriculture was in the capacity of witnesses. Moreover, while a Department of Agriculture official would be the natural choice of State official to bring an in personam RICO forfeiture proceeding9 against appellants for the alleged gasoline pump tampering if a civil proceeding were the State's goal, the complaint was instead initiated by the district attorney, charged with prosecuting all indictable offenses, see OCGA § 15-18-6(4), such as the predicate acts set forth in OCGA § 16-14-3(9) required to establish a pattern of racketeering activity to authorize a RICO forfeiture proceeding. See OCGA § 16-14-7(a).

However, it is the language utilized by the Camden County District Attorney in the complaint that establishes conclusively the criminal nature of the in

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9 Because OCGA § 16-14-7(m) operates "[i]n lieu of ... subsections (c) through (g)," in personam RICO forfeiture proceedings clearly are not subject to the limitation in subsection (d) that requires the district attorney to bring such complaints.

personam RICO forfeiture proceedings brought against appellants. The complaint alleges that appellants have directly or through an association with others committed numerous felonies, including theft, credit card fraud and racketeering activity. The entire emphasis of the complaint is on appellants' criminal culpability for the alleged crimes. "Civil forfeiture depends not upon a property owner's culpability but, instead, upon the property's being connected to some criminal act." (Footnote omitted.) 36 Am.Jur.2d, Forfeitures and Penalties, § 19, p. 490.

[4] We have little trouble concluding that the in personam RICO forfeiture provision in OCGA § 16-14-7(m) is, by its nature, necessarily criminal and punitive. We therefore hold that, by the clearest proof, OCGA § 16-14-7(m) imposes a sanction on appellants that is so punitive in form and effect as to render that proceeding criminal despite the Legislature's language to the contrary. See *Hudson v. United States,* supra, 522 U.S. at 104, 118 S.Ct. 488; *United States v. Ursery,* supra, 518 U.S. at 290, 116 S.Ct. 2135.

2. Because OCGA § 16-14-7(m) is in reality a criminal penalty, see Division 1, supra, its enforcement must conform to the constitutional safeguards that accompany criminal proceedings. The processes underlying civil and criminal proceedings are structurally and fundamentally different, as are the rights to be vindicated in each type of proceeding. See generally *Helvering v. Mitchell,* 303 U.S. 391, 402(3), 58 S.Ct. 630, 82 L.Ed.

917 (1938) ("[c]ivil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions"). See also *Pimper,* supra, 274 Ga. at 629-630, 555 S.E.2d 459 (detailing the procedural flaws of OCGA § 16-14-7(m)) (Hunstein, J., dissenting). It follows that the trial court erred by finding that the civil procedural rules set forth in the CPA are an adequate substitute for the substantive constitutional rights to which appellants are entitled.

[5] 3. "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law. [Cit.]" *United States v. One 1936 Model Ford V-8 De Luxe Coach,* 307 U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249 (1939). In the decades since Justice McReynolds wrote those words, and particularly since the enactment of the federal RICO and drug acts in the 1970s, the breadth of new forfeiture statutes as well as the ingenuity of legislatures in crafting novel forfeiture provisions have elicited statements of concern from members of the United States Supreme Court. See *Florida v. White,* 526 U.S. 559, 567, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999) (Souter, J., concurring) (noting that "legislatures are evincing increasing ingenuity in" resorting to "novel" forfeiture sanctions); *United States v. James Daniel Good Real Property,* 510 U.S. 43, 81-82 and n. 1, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (Thomas, J., concurring in part and dissenting in part) (expressing concern about the breadth of new forfeiture statutes). Georgia's in personam RICO forfeiture statute is not merely "novel," *Florida v. White,* supra; it is singular. OCGA

§ 16-14-7(m) lacks all of the procedural safeguards seen in our federal and sister state counterparts and expressly rejects even the minimum safeguards provided elsewhere in OCGA § 16-14-7 for in rem RICO forfeiture proceedings. While we have recognized that our Georgia RICO statute in general is "significantly broader than its federal counterpart," *Chancey v. State,* 256 Ga. 415, 418, 349 S.E.2d 717 (1986) (post-conviction challenge to constitutionality of RICO statute), OCGA § 16-14-7(m) "is so broad that it differs not only in degree, but in kind, from its historical antecedents." *United States v. James Daniel Good Real Property,* supra at 82, 114 S.Ct. 492 (Thomas, J., concurring in part and dissenting in part). Because OCGA § 16-14-7(m) is so "far removed from the legal fiction upon which the civil forfeiture doctrine is based," id., we conclude that this is the "appropriate case" foreseen by Justice Thomas in which it is necessary "to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture." (Footnote omitted.) Id. The trial court's judgment is reversed.

Judgment reversed.

All the Justices concur, except CARLEY and MELTON, JJ., who dissent.

IN THE SUPERIOR COURT OF CAMDEN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, ex rel., STEPHEN D. KELLEY, District Attorney for the Brunswick Judicial Circuit,

Plaintiff

AND

Jonathan Smith; Streamline Logistics, LLC.; Betty Padgett; B&L Express, Individually and on behalf of other similarly situated;

Gowen Oil Company, Inc.,

Intervening Plaintiffs

Vs.

Fairley Cisco; Cisco Travel Plaza, Inc.; Cisco Travel Plaza II, Inc.; Cisco Oil, Inc.; Cisco Express, Inc.; Cisco Enterprises, Inc.; Althea Cisco Moore a/k/a Althea Cisco Shave; Tammy Cisco Walker; Winfield Cisco; Charles McConnell; Poor Boy's Oil Company Inc.; Robert M. Clark; Alana McQuarry; Sherri Robbins;

United Fuel, Inc.; Keldeep S. Sekhon; Kingsland Management, LLC.; Kingsland Management II, LLC.; Jack Ghazi; Georgia Petro USA, LLC; Georgia Petro II USA, LLC; Georgia Energy USA LLC; Biju Abraham; Kashal Yekundi;

Defendants in Personam,

The Property and Premises of Cisco Travel Plaza II located at 5369 Laurel Island Parkway, Kingsland, Georgia, said property more particularly described in the legal description attached hereto as exhibit "A"

The Property and Premises of Cisco Travel Plaza II located at 491 Saint Marys Road, St. Marys, Georgia, said property more particularly described in the legal description attached hereto as exhibit "B"

The Property and Premises of Cisco Express located at 5289 Laurel Island Parkway, Kingsland, Georgia, said property more particularly described in the legal description attached hereto as exhibit "C"

Defendants in Rem

ORDER GRANTING PRELIMINARY INJUNCTION AND APPOINTING RECEIVER

The Plaintiff State of Georgia ex rel. Stephen D. Kelley, District Attorney for the Brunswick Judicial Circuit, having applied to the Court for an injunction and for the appointment of a receiver in the above-styled case, and it appearing to the Court, after evidence presented at a hearing on the Plaintiff's Application, that he is likely to prevail at trial on the issues, it is ORDERED as follows:

I. DISSOLUTION OF MARCH 4, 2008 ORDER

The Ex Parte Temporary Restraining Order appointing a Receiver entered March 4, 2008 is hereby dissolved. This order replaces the March 4, 2008 Order in its entirety.

II. DEFENDANTS SUBJECT TO ORDER

The Defendants that are subject to this preliminary injunction and receivership (hereinafter called "Enjoined Defendants") are:

Fairley Cisco
Cisco Travel Plaza, Inc.
Cisco Travel Plaza, II, Inc.
Cisco Oil, Inc.
Cisco Express, Inc.
Cisco Enterprises, Inc.
Althea Cisco Shave
Tammy Cisco Walker
Poor Boys Oil Co., Inc.
(Adopting terms of 3/31 Consent Order)
Alana McQuarry

(Adopting terms of 3/31 Consent Order)
United Fuel, Inc.
Keldeep Sekhon
Kingsland Management, LLC
Kingsland Management II, LLC

III. PRELIMINARY INJUNCTION

A. The Enjoined Defendants, their creditors, officers, agents, servants, employees, attorneys-in-fact, and those persons acting in concert or participation with them who receive actual notice of this Order ("Noticed Entities and Individual"), are restrained and enjoined from destroying, erasing, mutilating, concealing, altering, transferring to any entity other than the Receiver appointed herein or his attorneys or agents, or otherwise disposing of in any manner, directly or indirectly, any documents relating to (1) the allegations in the Complaint brought by the Plaintiff, (2) the business affairs of any of the Enjoined Defendants, or (3) the assets of any of the Enjoined Defendants (including, without limitation, any assets transferred by any of the Enjoined Defendants). These documents include but are not limited to: books and records; audio or video tape recordings; computer tapes, discs or other computerized records (i9ncluding e-mail in any form); accounting data; personal and business checks (fronts and back); correspondence; forms; advertisements; brochures; manuals; banking records; customer lists; customer files; invoices; telephone records;

ledgers; payroll records; scripts; postal receipts; appointment books; state or federal income tax returns; or other documents of any kind in their possessions, custody or control;

B. The Noticed Entities and Individuals, unless directed otherwise by the Receiver, shall notify the Receiver of the receipt of any funds that are related to any of the Enjoined Defendants subsequent to the date of entry of this Order, and shall identify each such receipt by the name, address, telephone number of the payer and the amount of funds received; and

C. Absent leave of the Court upon notice of the Plaintiff and the Receiver, all persons are stayed from doing any of the following:

1. Using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, garnishment, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon, setting off against, any property or assets owned by, or n the possession of, any of the Enjoined Defendants or the Receiver, wheresoever situated;

2. Attempting to modify, cancel, terminate, call, extinguish, revoke, or accelerate the due date, or any lease, loan, mortgage,

indebtedness, security agreement or other agreement with any of the Enjoined Defendants; and

3. Doing any act or thing whatsoever to interfere with the Receiver taking control or possession of, or managing the property and assets owned, controlled or in the possession of any of the Enjoined Defendants, or in any way interfering with or harassing the Receiver, or interfering in any manner with the exclusive jurisdiction of this Court over the receivership estate.

D. The Enjoined Defendants and their officers, agents, servants, employees and attorneys and all other persons or entities directly or indirectly under their control or under common control with them, and all other persons or other entities acting in concert or participation with them, who receive actual notice of this Order by person service or otherwise, unless agreed to by the Receiver or until further order of this Court, are hereby restrained and enjoined, from:

1. Transferring, encumbering, selling, concealing, pledging, hypothecating, assigning, spending, withdrawing, disbursing, conveying, gifting, dissipating, or otherwise disposing of any funds, property, accounts, contracts, lists of customer names, chares of stock, or other assets,

wherever located, that are (1) owned by, controlled by, held for the benefit of, or belong to, any Enjoined Defendant, in whole or in part; (2) in the actual or constructive possession of any Enjoined Defendants; or (3) held by an agent of any Enjoined Defendant as a retainer for the agent's provision of services to any Defendant. The assets referenced in the subparagraph shall include, but are not limited to, any assets held by, for or under the name or alias of any Defendant at any bank or savings and loan institution, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, or other financial institution of any kind;

2. Opening or causing to be opened any safe deposit boxes titled in the name of any Enjoined Defendant, or subject to access by any Defendant; and

3. Insuring charges or cash advances on any credit card issued in the name, singly or jointly, of any Enjoined Defendant; or for which an Enjoined Defendant is obligated unless approved by the Receiver.

4. The assets affected by this Section shall include both existing assets and assets acquired after the effective date of this Order, including, without limitation, those acquired by loan or gift, and assets in the form of retainers

paid to Enjoined Defendants' agents for compensation for providing services to Enjoined Defendants. Any Enjoined Defendant or any third party holding assets on behalf of or for the benefit of any Enjoined Defendant, who receives actual notice of this Order, shall hold such assets, including without limitation, payments, loans and gifts, received after service of this Order, and shall provide written notice to the Receiver setting forth the description of such assets being held.

IV. RECEIVER

Michael G. Lambros, Esq. an attorney-at-law and a member of the State Br of Georgia, is appointed to act as receiver (the "Receiver"), with full power of any equity receiver under the laws of

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Georgia, for the "Enjoined Defendants." The Receiver is hereby empowered to:

A. Take and retain possession, custody, and control, of all assets and property (including, without limitation, any real, personal, tangible, or intangible property) in which any Enjoined Defendant holds a direct or indirect interest, which power includes the power to sell, transfer, or otherwise dispose of any such asset or property and, as the attorney in fact, to execute and deliver all necessary documents on behalf of

any Enjoined Defendant (including without limitation, all contracts of purchase and sale, deeds, affidavits, title transfer and license transfers) in connection with the sale, transfer, or other disposal of such assets and property;

B. Take and retain possession, custody, and control of the books and records of the Enjoined Defendants, demand inspection and turnover of the books and records of any entity in which any of the Enjoined Defendants has a direct or indirect interest, and take all steps the Receiver deems necessary to secure and protect the assets and property of the Enjoined Defendants including but not limited to the premises, files, and information systems of Enjoined Defendants;

C. Engage and employ persons, in his discretion, to assist him, in carrying out his duties and responsibilities hereunder, including accountants, examiners, investigators, and other experts and professionals;

D. In his discretion and as he deems appropriate, manage, control, operate, supervise, oversee, and maintain Enjoined Defendants' businesses (including but not limited to the power (to) direct, hire, suspend, and (terminate) personnel), with the right to possess, receive, or use income earnings, rents, and profits to commence, maintain, defend, or participate in

legal proceedings to sue for, collect, receive and take into possession of, all goods, chattels, rights, general intangibles, choses in action, credits, monies, effects, lands, books and records of account, and other papers, including exclusive authority to make expenditures on behalf of Enjoined Defendants with a view to preventing loss, damage, and injury, and preserving assets and the records of Enjoined Defendants;

E. Bring any claim or causes of action on behalf of any of the Enjoined Defendants or by and through any interest that any of Enjoined Defendants may have. The Receiver may also institute, prosecute and defend, compromise, adjust, intervene in, or become a party to such actions or proceedings in state or federal court as may in the Receiver's opinion, be necessary or appropriate for the collection, marshaling, protection, maintenance, and preservation of the assets of any of the Enjoined Defendants or the recovery of assets transferred by any of the Enjoined Defendants. The Receiver may also do so in order to carry out the terms of this Order (including, without limitation, any action asserting claims under applicable fraudulent transfer or partnership laws). Likewise, the Receiver has the power to defense, compromise or adjust or otherwise dispose of any and all suits, actions or proceedings instituted against the Receiver or against any of the Enjoined Defendant(s). The Receiver may also appear in,

and conduct the defense of, any suit or to adjust or compromise any actions or proceedings now pending in any court by or against Enjoined Defendants where such prosecution, defense, or other disposition of any such action or proceedings will, in the judgment of the Receiver, be advisable or proper for the protection of the, assets, properties or interest of any of the Enjoined Defendant(s), and seek any and all legal or equitable remedies afforded an equity receiver under applicable state or federal law.

F. Review the records and reports of transactions by the Enjoined Defendants and report to the Court any transactions that appear to be outside the ordinary court(sic) of business.

G. Freeze, seize, open and close bank accounts, bank safe deposit boxes, and securities accounts, purchase or sell securities in any such accounts of any of the Enjoined Defendant, and execut3e checks or otherwise disburse money from any bank of securities accounts of any of the Enjoined Defendants to pay the obligations of such Enjoined Defendant in the normal course of business, enter into such other agreements in connection with the administration, care preservation and maintenance of the properties or assets of any of the Enjoined Defendants as the Receiver may deem advisable;

H. Have all the power of the directors, officers and managers of the Enjoined Defendants, whose powers and authority are hereby suspended; and

I. The Receivers shall continue to act over Defendants Kingsland Management, LLC and Kingsland Management II, LLC (collectively referred to as "KM"), but only to the extent that he shall continue to maintain control of all property and assets of KM, including without limitation cash in bank accounts, that came into his possession, custody and control pursuant to the Order Appointing Receiver and Granting Temporary Restraining Order previously entered in this case. Such assets of KM shall be used by the Receiver (1) to pay in full debt incurred under his authority during the period of his administration, and (2) to pay in full the administrative fees and expenses of the Receiver and of the professionals employed by him from inception of the receivership to the date of entry of this Order upon approval thereof by the Court following submission to the Court of the Receiver's statement setting forth such fees and expenses. The Receiver shall have no further responsibility for operating the businesses he operated pursuant to the Temporary Restraining Order.

J. Take such further action as the Court shall deem equitable, just and appropriate under the circumstances upon proper application.

IT IS FURTHER ORDERED that the Receiver serves herein as an officer of this Court solely in a representative capacity and is not personally liable for any actions taken in good faith and in conformity with the duties and responsibilities set forth herein or pursuant to any statute, rule, regulation, or other legal authority.

V. REPORTING

The Receiver shall report to the Court and the Enjoined Defendants no later than ninety (90) days from the date of entry of this Order, and each ninety (90) days thereafter, subject to extensions as may be granted by the Court, the following information for each of the Enjoined Defendants (based upon the information provided and reviewed by the Receiver up and until said date):

A. All assets, liabilities, money, funds, securities, and real or personal property currently held directly or indirectly by or for the benefit of the Enjoined Defendants and each of their controlled, related, or affiliated entities, including but not limited to bank accounts, brokerage accounts, investments, business interests, and real and personal property,

wherever situated identifying and describing each asset and liability, its current location and amount;

B. The names, last known addresses, and account-identifying information of all financial institutions, bailees, debtors and other persons and entities that are currently holding any money, assets, funds, securities, real or personal property for the direct or indirect benefit of any of the Enjoined Defendants.

VI. BONDING

The Receiver shall not be required to post any bond or security.

VII. FEES AND COSTS INCURRED

The Enjoined Defendants shall pay the reasonable costs, fees, and expenses of the Receiver incurred in connection with the performance of his duties described herein, including but not limited to the reasonable costs, fees, and expenses of all persons who may be engaged or employed by the Receiver to assist him in carrying out his duties and obligations.

All applications for costs, fees, and expenses of the Receiver and those employed by him shall be made by application to the Court, setting forth in reasonable detail the nature of such costs, fees and expenses. Upon approval of any such application by the Court, the Receiver may pay himself and those employed by him

from the assets of the Enjoined Defendants under his control.

Notwithstanding anything to the contrary in this section, the Receiver is authorized to pay from the receivership estate to himself and any person engaged or employed by him (including, without limitation, attorneys, accountants, and such other consultants as he may determine to be necessary) a reasonable retainer to secure payment of the costs, frees, and expenses of the Receiver or such person engaged or employed by him, such retainer to be held pending approval of such cots, fees, expenses by the Court.

VII. INDEMNIFICATION

The Receiver and all persons whom he may engage or employ to assist him in carrying out his duties and obligations hereunder shall not be liable for act or omission of the Receiver or such person, or any of their partners, employees, or agents unless it shall be proven that the Receiver or such other person acted recklessly and in bad faith. This provision shall apply to claims based on conduct during the term of any agreement that may be entered into between the Receiver and any other person who may be engaged or employed by the Receiver hereunder, even if such claims are filed after the termination of any such agreement.

IX. COOPERATION

The Enjoined Defendants and any entities that they control, in addition to their officers, directors, agents, servants, employees, and attorneys-in-fact and attorneys-at-law, as well as all persons who have actual knowledge of this Order by service or otherwise, shall:

A. Transfer forthwith to the Receiver all funds, assets, and property, owned beneficially or otherwise, of the Enjoined Defendants;

B. Provide to the Receiver all information requested relating to the past and present operations, activities and condition (financial, legal, or otherwise) of the Enjoined Defendants and shall take no action, directly or indirectly, to hinder, obstruct, delay or otherwise interfere in any manner with the actions of the Receiver or any other person engaged or employed by the Receiver to assist him in carrying out his duties and obligations herein;

C. Provide to the Receiver forthwith access to, and the location of, any and all documents, books and records of accounts, financial and accounting records, balance sheets, income statements, bank records (including monthly statements, cancelled checks, records of wire transfers, and check registers), clients and customer lists, title documents and other papers of the Enjoined Defendants; and computer files

and databases in their possession, custody or control relating to the assets of the Enjoined Defendants or to the allegations of the Complaint by the Plaintiff, as may be amended, including but not limited to, documents relating to the business operations of the Enjoined Defendants;

D. Provide the Receiver with all keys, combination to locks, passwords, identification numbers, and entry codes required to open or gain access to any property, computer files, safe deposit boxes, and all money or other assets deposited in or held by any financial institution to the credit of any of the Enjoined Defendants wherever situated; and

E. Provide the Receiver with all passwords or codes req1uired to access any hardware, software, or electronic files on any media relating to any of the Enjoined Defendants.

X. RETENTION OF ASSETS AND RECORDS BY THIRD PARTIES

Other than by agreement of the Receiver, any financial or brokerage institution, escrow agent, title company, commodity trading company, common carrier, storage company, trustee, or any person or other entity who received any funds from any of the Enjoined Defendants who are served with a copy of this

Order, pending written instructions by the Receiver, shall:

A. Deny access, other than to the Receiver, to any safe deposit boxes that are either:

1. Titled in the name, individually or jointly of any Enjoined Defendant(s) or other party subject to this Order; or

2. Subject to access by any Enjoined Defendant(s) or other party subject to this Order; and

B. Provide the Receiver, within four (4) business days after service of this Order, a statement setting forth:

1. The identification of each account or asset titled in the name, individually or jointly, or held on behalf of, or for the benefit of, any Enjoined Defendant(s) or other party subject to this Order, whether in whole or in part;

2. The balance of each such account asset, or a description of the nature and value of such account or asset;

3. The identification of any safe deposit box that is either titled in the name of, individually or jointly, or is otherwise subject to access or control by, any Enjoined Defendants(s)

or other party subject to this Order, whether in whole or in part; and

4. If the account, safe deposit box, or other asset has been closed or removed since January 1, 2005, the date closed or removed and the balance on said date.

IT IS FURTHER ORDERED that this section shall not prohibit transfers in accordance with any provision of this Order, or any further order of this Court. The Receiver may serve this Order on any bank, savings and loan institution, credit union, financial institution, brokerage house, escrow agent, title company, commodity trading company, common carrier, storage company, trustee or any person or entity.

SO ORDERED this 8th day of April, 2008.

s/ JOHN E. GIRARDEAU
SENIOR JUDGE,
SUPERIOR COURTS
PRESIDING BY
DESIGNATION

cc: All Parties

1166 (2)

No. 09-1557

Supreme Court, U.S.
FILED
JUL. 2 2 2010
OFFICE OF THE CLERK

In the
Supreme Court of the United States

PATCO ENERGY EXPRESS, L.L.C., PATCO ENERGY EXPRESS II, L.L.C., and PATCO ENERGY EXPRESS III, L.L.C.,

Petitioners,

v.

MICHAEL G. LAMBROS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. In order for a federal district court to have subject matter jurisdiction over a court appointed receiver, must a plaintiff obtain leave of the court appointing the receiver before filing suit?

2. Does a state supreme court decision finding state law *in personam* civil RICO forfeiture procedures unconstitutional render a state law *in rem* civil RICO forfeiture unconstitutional as well?

3. Is a court appointed receiver entitled to absolute or qualified immunity while he is acting within the scope of his authority?

PARTIES TO THE PROCEEDING

Petitioners are Patco Energy Express, L.L.C., Patco Energy Express II, L.L.C., and Patco Energy Express III, L.L.C. Petitioners are jointly owned and managed by Anjay Patel. Petitioners are engaged in the business of owning and operating gas and diesel fueling stations and the convenience stores associated with same. Petitioners allege that Respondent unlawfully seized certain inventory property contained in three fueling station convenience stores operated by the Petitioners. All of the Petitioners were plaintiffs in the District Court and Appellants in the Court of Appeals.

Respondent is Michael G. Lambros, a receiver appointed by the Superior Court of Camden County, Georgia to protect assets seized as the result of a state-law, civil RICO proceeding. Respondent was a defendant in the District Court and an Appellee in the Court of Appeals.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Michael G. Lambros ("Lambros"), respectfully requests that this Court deny the Petition for Writ of *Certiorari* ("Petition") submitted by Petitioners, Patco Energy Express, L.L.C., Patco Energy Express II, L.L.C., and Patco Energy Express III, L.L.C. (collectively, "Patco").

ADDITIONAL STATUTES INVOLVED

O.C.G.A. § 9-8-5
Title 9. Civil Practice
Chapter 8. Receivers
§ 9-8-5. Intervention of persons asserting equitable remedies

Where property has been placed in the hands of a receiver, all persons properly seeking to assert equitable remedies against such assets shall become parties to the case by intervention and shall prosecute their remedies therein.

COUNTER-STATEMENT OF THE CASE

There is no reason, let alone a compelling reason, for the Court to grant this Petition. All of the issues presented by the Petition are well-settled areas of law. There is no split between the courts of appeal regarding any of the issues presented by the Petition which would require this Court's attention to resolve. Therefore, the Eleventh Circuit Court of Appeals' unpublished, *per curiam* decision below does not present any reason for this Court to grant this Petition.

The controversy underlying this Petition began on March 4, 2008 when the District Attorney for the Brunswick Judicial Circuit filed a lawsuit against Fairley Cisco ("Cisco") in the Superior Court of Camden County, Georgia, Case No. 08V0302-SS2, (the "State Court Action") for violation of Georgia's civil RICO statute, O.C.G.A. § 16-14-1 *et seq*. Pet. App. 35. Cisco was the owner of various fueling stations in Georgia, and the State Court Action named Cisco and his business entities[1] as defendants *in personam*. Pet. App. 35. Additionally, the State Court Action named three fueling stations located in Camden County owned by Cisco Travel Plaza II, Inc. and Cisco Express, Inc. as defendants *in rem*. Pet. App. 86-87. The interactions between Petitioners and Respondent regarding these three fueling stations form the basis for this Petition and the proceedings below.

The State Court Action alleged that Cisco, his business entities, and the three fueling stations violated Georgia's Civil RICO statute by tampering with diesel and gasoline pumps in order to make them dispense a smaller volume of fuel than that indicated to the consumer. Pet. App. 36. On April 9, 2008, the Superior Court of Camden County granted the State of Georgia's Motion for a Preliminary Injunction in the State Court Action and appointed Respondent as Receiver over Cisco's property and assets (the "Receivership Order"). Pet. App. 86-104.

The Receivership Order authorized Respondent to take and retain possession, custody, and control over

[1] Cisco Travel Plaza, Inc.; Cisco Travel Plaza II, Inc.; Cisco Oil, Inc., Cisco Express, Inc.; and Cisco Enterprises, Inc.

all assets and property in which Cisco and his business entities held a direct or indirect interest. Pet. App. 93-94. The Receivership Order also granted Respondent the discretion to manage, operate, supervise, and maintain any of Cisco's businesses. Pet. App. 94-95 As a corollary to those rights, the Receivership Order granted Respondent the authority to participate in legal proceedings to collect and take possession of all goods or chattels of those businesses. Pet. App. 95-96.

Respondent's receivership also included the three fueling stations referenced above (collectively, the "Stations"). Pet. App. 95. Petitioners allege that, prior to the filing of the State Court Action, Cisco sold the Stations to Keldeep Sekhon, also a defendant to the State Court Action. Pet. App. 36-37, 86-87. Sekhon allegedly disappeared, and Petitioners claim that another entity, Georgia Petro, L.L.C., approached them, claiming to have purchased the Stations from Sekhon. Pet. App. 36-37. Following Respondent's appointment as Receiver, Petitioners executed an operating agreement with Georgia Petro for the Stations. Pet. App. 37-39. Thereafter, Petitioners allege that they purchased inventory for the Stations and began operations. Pet. App. 38.

On October 30, 2008, Respondent's counsel wrote a letter to Petitioners counsel stating that the Respondent had recently acquired ownership of the Stations and that Petitioners had been divested of their interest in them. Pet. App. 40. The correspondence put Petitioners on notice of their status as tenants at sufferance and informed them that Respondent, as owner of the Stations, had terminated any possessory rights they might claim. Pet. App. 40. The correspondence demanded that

Petitioners return possession of the Stations to Respondent and advised Petitioners that failure to do so would result in Respondent filing a dispossessory action. Pet. App. 40. Petitioners refused Respondent's demand.

Nevertheless, on January 5, 2009, Petitioners and Respondent met to resolve the issues between them, but they were unable to resolve their issues on that date. Pet. App. 40. However, on the next day, January 6, 2009, Petitioners' counsel sent correspondence to Respondent's counsel stating that Petitioners would voluntary relinquish possession of the Stations. Pet. App. 40-41.

Thereafter, Petitioners closed the Stations and surrendered the keys to the Camden County District Attorney for delivery to Respondent. Pet. App. 41. Petitioners allege that Respondent then seized the inventory contained in the Stations. Pet. App. 41. On January 13, 2009, Respondent's counsel advised Petitioners' counsel that the inventory was being removed from the Stations and that Petitioners were no longer permitted on the properties. Pet. App. 41.

Rather than applying to the Superior Court of Camden County for an order releasing their claimed property from the Receivership, Petitioners filed suit against Respondent in the United States District Court for the Southern District of Georgia on January 27, 2009. Pet. App. 34-46. Petitioners allege that Respondent is liable under 42 U.S.C. § 1983 for seizing their alleged property in bad faith and without a hearing. Plaintiffs further allege that all of their claims against Respondent arose during the course of the Receivership for acts performed in Respondent's

official capacity as Receiver. However, Petitioners do not allege that they sought the permission of the Superior Court of Camden County before filing suit against Respondent.

Shortly after filing their Complaint, Petitioners filed a Motion for Emergency Hearing for Temporary Restraining Order and Preliminary Injunction on February 4, 2009. The District Court held a hearing regarding the injunction on February 10, 2009 and denied Petitioners' Motion on February 11, 2009. Patco Energy Express, L.L.C. v. Lambros, No. CV2009-004, 2009 WL 331483 (S.D. Ga. Feb. 11, 2009). Petitioners then filed an appeal challenging the denial of their Motion.

Pending that appeal, Respondent filed a Motion to Dismiss. On May 8, 2009, the District Court granted Respondent's Motion, dismissing the Petitioners Complaint in its entirety. Patco Energy Express, L.L.C. v. Lambros, No. CV2009-004, 2009 WL 1292492 (S.D. Ga. May 8, 2009). The District Court held that the Petitioners' failure to obtain leave of the Superior Court of Camden County before instituting their action against the Respondent deprived the District Court of subject matter jurisdiction. Id. at *2 (citing Barton v. Barbour, 104 U.S. 126, 127, 26 L. Ed. 672 (1888)). On May 13, 2009, Petitioners appealed both of the District Court's rulings. The Court of Appeal consolidated both appeals on July 13, 2009.

Two days later, on June 15, 2009 the Supreme Court of Georgia decided Cisco v. Georgia, holding that the *in personam* civil forfeiture provisions of Georgia's civil RICO statute, O.C.G.A. § 16-14-7(m), violated the procedural due process protections of the United

States and Georgia Constitutions. Cisco v. Georgia, 285 Ga. 656, 680 S.E.2d 831 (2009). However, Cisco did not address the *in rem* civil forfeiture provisions of Georgia's civil RICO statute, and the Cisco court recognized the existence of the *in rem* forfeiture proceedings against the Stations. Id. at 656 n.1, 832 n.1.

On November 24, 2009, the Eleventh Circuit Court of Appeal issued a *per curiam* decision, affirming the District Court dismissal of Petitioners' Complaint. Patco Energy Express, L.L.C. v. Lambros, Nos. 09-10790, 09-12547, 353 Fed. Appx. 379 (11th Cir. 2009) (per curiam). The Court of Appeal, applying this Court's decision in Barton v. Barbour (the "Barton Doctrine"), held that Petitioners' failure to obtain leave from the Superior Court of Camden County prior to suing Respondent deprived the District Court of subject matter jurisdiction. Id. at 381 (citing Barton, 104 U.S. at 127). The Court of Appeal also addressed the Georgia Supreme Court's decision in Cisco, finding the decision irrelevant because Respondent's alleged actions and Petitioners' Complaint predated Cisco and, therefore, did not relieve Petitioners of their duty to obtain leave from the Superior Court of Camden County prior to filing their Complaint. Id. Petitioners then filed a Petition for Panel Rehearing on December 1, 2009. The Court of Appeal denied the Petition for Panel Rehearing on May 23, 2010. This Petition followed.

There is no compelling reason, indeed no reason, for the Court to grant this Petition. Sup. Ct. R. 10. The Barton Doctrine is a well-settled and widely accepted rule governing suits against court-appointed receivers. The Court of Appeal's *per curiam* treatment of

Petitioners' appeals demonstrate the uncontroversial nature of this issue. Because the Barton Doctrine is well settled law, the issues raised by this Petition do not come under the principal purpose of certiorari jurisdiction, the resolution of conflicts among the Courts of Appeal and state courts of last resort. Braxton v. U.S., 500 U.S. 344, 347-48, 111 S. Ct. 1854, 1857 (1991). Additionally, certiorari is not appropriate because the issues raised by this petition are not novel questions of federal law. Kossick v. United Fruit Co., 365 U.S. 731, 733, 81 S. Ct. 886, 889 (1961). Accordingly, Respondent respectfully requests that the Court deny the Petition.

REASONS FOR DENYING THE PETITION

I. The Barton Doctrine Applies.

"It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained." Barton, 104 U.S. at 128. The Barton Doctrine denies courts jurisdiction over claims made against court-appointed receivers, unless the requisite leave is first obtained. Id. at 139. The Barton Doctrine is well-settled law in the State of Georgia and in the Eleventh Circuit. Bugg v. Lang, 35 Ga. App. 704, 134 S.E. 623 (1926); Carter v. Rodgers, 220 F.3d 1249, 1252-53 (11th Cir. 2000). Additionally, the Barton Doctrine has been adopted by courts in every circuit.[2]

[2] The Courts of Appeal in the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits apply the Barton Doctrine: Muratore v. Darr, 375 F.3d 140 (1st Cir. 2004); Lebovits v. Scheffel (In re Lehal Realty Assocs.), 101 F.3d 272 (2d Cir. 1996); W. N.Y. & P.R. Co. v. Penn Ref. Co., Ltd., 137 F. 343, (3d

In Carter v. Rodgers, the Eleventh Circuit adopted the Barton Doctrine to claims made against a bankruptcy trustee who was sued without obtaining leave of the bankruptcy court appointing the trustee. 220 F.3d at 1252. The Eleventh Circuit noted that the issue was a matter of first impression in the circuit; however, it found support for the adoption of the Barton Doctrine legion. Id. (quoting In re Linton, 136 F.3d 544, 545 (7th Cir. 1998)). The plaintiff in Carter attempted to side step the Barton Doctrine by arguing that it only applied when a state court remedy is sought; however, the Eleventh Circuit disagreed, holding that leave of the appointing court is required to establish subject matter jurisdiction over a suit against a court appointed receiver, regardless of whether the plaintiff files suit in state or federal court. Id. at 1253 (quoting In re Kashani, 190 B.R. at 885).

Despite the clarity of the Barton Doctrine, Petitioners did not obtain leave of the Superior Court of Camden County before filing their lawsuit. To date, Petitioners have not explained their failure to accomplish this simple task. Instead, Petitioners

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Cir. 1905); Gordon v. Nick, No. 96-1858, 162 F.3d 1155 (4th Cir. 1998) (unpublished table decision); Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236 (6th Cir. 1993); In re Linton, 136 F.3d 544 (7th Cir. 1998); Kashani v. Fulton (In re Kashani), 190 B.R. 875 (9th Cir. BAP 1995); Springer v. Infinity Group Co., No. 98-5182, 189 F.3d 478 (10th Cir. 1999) (unpublished table decision); Carter, 220 F.3d at 1252-53. The Fifth and Eighth Circuit Courts of Appeal have not yet applied the Barton Doctrine, but the district and bankruptcy courts in the those circuits have: In re Costal Plains, Inc., 326 B.R. 102 (Bankr. N.D. Tex. 2005), *aff'd on other grounds*, 338 B.R. 703 (N.D. Tex. 2006); Republic Bank of Chicago v. Lighthouse Mgmt. Group, Inc., No. 10-537, --- F. Supp. 2d ---, 2010 WL 2539344 (D. Minn. June 16, 2010).

make repeated statements about irrelevant, unsupported alleged exceptions to the Barton Doctrine.

Petitioners assert the applicability of 28 U.S.C. § 959(a) as a complete exception to the Barton Doctrine on the basis of the statute's limited business operations exception, which applies when a trustee or receiver is accused of violating "state and federal laws associated with the operation of the business" under their control. In re J.F.D. Enterprises, Inc., 223 B.R. 610, 624 (Bankr. D. Mass. 1998), aff'd DiStefano v. Stern, 236 B.R. 112 (D. Mass. 1999), aff'd In re J.F.D. Enterprises, Inc., 215 F.3d 1312 (1st Cir. 2000). Petitioners' position ignores the purpose of § 959(a).

The purpose of § 959 is twofold. First, it relieves parties having post-petition claims "from the obligation of bringing actions in the" forum appointing the bankruptcy trustee. Id. Second, it ensures that the bankrupt estate is obligated "to comply with applicable state and federal laws associated with the operation of the [bankrupt] business." Id. "There is no evidence . . . that it was intended to expand the personal liability of court appointed functionaries." Id. Instead, § 959(a) is only intended to apply ***after a bankruptcy petition is filed***. Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47 (2d Cir. 1976) (emphasis supplied).

Moreover, Petitioners' assertion misunderstands the meaning of § 959(a). In re DeLorean Motor Co., 991 F.2d at 1241. § 959(a) "does not apply to suits . . . for actions taken while administering the estate." Id. Actions taken to collect, preserve, hold, and liquidate assets "do not constitute 'carrying on business' as that term has been judicially interpreted." Id. Therefore,

Respondent's collection and liquidation of the Stations cannot fall under § 959(a) because those actions do not constitute "carrying on business." Id.

Petitioners also cite 11 U.S.C. § 543(b) as an exception to the Barton Doctrine. Again, this position is incorrect and directly contradicted by case law. § 543(b) only applies to receivers appointed by state courts: when the receiver "has knowledge of the commencement of a case under the [Bankruptcy] Code . . . ." In re Lizeric Realty Corp., 188 B.R. 499, 506 (Bankr. S.D.N.Y. 1995).

Here, neither § 959(a) or § 543(b) applies because there is no bankruptcy filing at issue. Instead, the origin of this Petition is a state court civil RICO proceeding. Therefore, the application of § 959(a) or § 543(b) to the underlying facts is strained at best.

Finally, the Receivership Order did not waive the Barton Doctrine by giving blanket permission to sue Respondent. Petitioner relies upon O.C.G.A. § 9-8-3 and choice quotations from the Receivership Order to assert that the Superior Court of Camden County waived the requirements of the Barton Doctrine when it created the Receivership. Petitioners' reliance on O.C.G.A. § 9-8-3 is misplaced, and Petitioners' position ignores other sections of the Georgia Code pertaining to receivers. In particular, Petitioners ignore O.C.G.A. § 9-8-5, which requires those claiming a remedy in property held by a receiver ***to intervene in the action creating the receivership*** in order to assert their rights. In Castleberry v. Long, the Supreme Court of Georgia held that a purported purchaser of property from a corporation in receivership was required to file an intervention in the suit in which the receivership

was authorized in order to assert its rights in the property seized by the receiver. Castleberry v. Long, 176 Ga. 293, 167 S.E. 883 (1933).

Here, the application of § 9-8-5 and Castleberry is clear. Petitioners are parties asserting a right in property placed in the hands of a receiver, the Respondent. Georgia law requires the Petitioners to file an intervention in the suit which established the receivership, not unlike the requirements of the Barton Doctrine. Therefore, the Barton Doctrine applies to Petitioners claims, barring any suit against Respondent, absent leave from the Superior Court of Camden County.

II. Cisco v. Georgia is Irrelevant.

Petitioners incorrectly claim that Respondent's appointment as receiver is void *ab initio* because of the decision in Cisco v. Georgia where the Supreme Court of Georgia held that Georgia's *in personam* civil RICO forfeiture procedures were unconstitutional. 285 Ga. at 657-58, 680 S.E.2d at 833-34. Petitioners' claims ignore the basis upon which the Court of Appeals held Cisco irrelevant.

In the underlying Court of Appeals opinion, the court held that Cisco was irrelevant to Petitioners' claims because all of the interactions between Petitioners and Respondent, the filing of the Complaint in District Court, and the dismissal by the District Court, occurred ***before*** the Georgia Supreme Court decided Cisco. Patco Energy Express, L.L.C., 353 Fed. Appx. at 381 (emphasis supplied). Therefore, when the facts underlying the Complaint and this Petition occurred, Respondent was a duly appointed

receiver. Id. Thus, the Court of Appeals correctly found that Petitioners were still required to adhere to the requirements of the Barton doctrine because "[n]othing in the Cisco case relieves [Petitioners] of the duty to seek the leave from the appointing court before filing suit against Lambros in a second court." Id.

Additionally, Petitioners completely misunderstand Cisco. The Cisco court held that O.C.G.A. § 16-14-7(m), the section of Georgia's civil RICO statute providing for pre-hearing *in personam* forfeiture, was unconstitutional because it lacked the necessary safeguards of criminal procedure. 285 Ga. at 657-58, 680 S.E.2d at 833-34. However, Cisco did not invalidate Georgia's *in rem* civil RICO forfeiture section, which the court found had ample historical support. Id. at 659-60, 834-35 (citing U.S. v. Bajakajian, 524 U.S. 321, 330, n.5, 118 S. Ct. 2028 (1998); Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-82, 94 S. Ct. 2080 (1974)).[3] In fact, the court specifically recognized that the State Court Action "also included *in rem* forfeiture proceedings against the three truck stops [the Stations]." Id. at 656 n.1, 832 n.1.

Therefore, Cisco is not applicable because (1) Cisco did not excuse Petitioners' failure to comply with the Barton doctrine and (2) the State Court Action and the

[3] "The United States Supreme Court has recognized that civil asset forfeiture, with its biblical roots and common law development in medieval England, has for centuries been an in rem proceeding against property, operating under the legal fiction that the seized property, and not the property's owner, is the guilty party."

Receivership Order allowed for the *in rem* forfeiture of the Stations.

III. Respondent Has Absolute and Qualified Immunity.

Respondent, as a receiver, is entitled to both absolute and qualified immunity. Valdez v. City and County of Denver, 878 F.2d 1285, 1288 (10th Cir. 1989) (noting that the circuits "agree with virtual unanimity that court officers sworn to execute court orders are shielded by absolute immunity in the performance of their duty"); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982) (qualified immunity). Respondent's entitlement to immunity is a matter of federal law and cannot be diminished or modified by state law. Martinez v. Cal., 444 U.S. 277, 284 & n.8, 100 S. Ct. 553, 558 & n.8 (1980). Therefore, Petitioners' position regarding the Receivership Order is irrelevant because state law cannot define the defenses to a § 1983 action. Id.

Absolute judicial immunity applies to all of a receiver's actions taken while acting within the scope of his authority, even if a party alleges that the receiver's actions were "in error, malicious, or in excess of [his] jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S. Ct. 1099 (1978). An allegation that a receiver acted in bad faith will not overcome his defense of absolute judicial immunity. Mireles v. Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 288 (1991). The only exception to absolute judicial immunity applies when a receiver's actions are *prima facie* beyond the scope of the receiver's official duties, such as when the receiver acts in a private, non-official capacity. Property Mgmt. & Invs., Inc. v. Lewis, 752 F.2d 599,

603 (11th Cir. 1985); Henzel v. Gerstein, 608 F.2d 654, 657-58 (5th Cir. 1979).

Here, the dismissal of Petitioners' complaint was proper because Petitioners did not make sufficient allegations to support a claim against Respondent. Petitioners were required to plead that Respondents actions exceeded the scope of this authority in order to state a claim under § 1983. Petitioners have not made the requisite allegations, and the allegations they have made, including the allegation that there was no basis for the seizure fo the Stations, are simply insufficient to overcome Respondent's absolute judicial immunity. Stump, 435 U.S. at 356-57, 98 S. Ct. at 1105.

Additionally, Respondent is entitled to qualified immunity. Qualified immunity protects those who perform discretionary functions while acting as government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S. Ct. at 2738. The doctrine of qualified immunity employs a standard of objective reasonableness to determine if the official's actions are entitled to immunity. Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 925 (11th Cir. 2000). Objective reasonableness under this standard is measured "by reference to clearly established law" ***at the time the questioned action occurred***. Harlow, 457 U.S. at 818, 102 S. Ct. at 2738 (emphasis added). "[A] clearly established law" is one that gives the defendant fair warning that the conduct is unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516 (2002). Therefore, Petitioners' interpretation of Cisco would not defeat Respondent's

qualified immunity, even if Petitioners' interpretation was correct, because the "clearly established law" in Georgia at the time Respondent seized the Stations permitted his actions, regardless of whether the forfeiture was *in rem* or *in personam*.

Respondents' seizure of the Stations occurred in furtherance of his official duties as a Receiver appointed by the Superior Court of Camden County to protect receivership assets. Respondent's seizure of the stations was within his discretion to protect those assets he was charged to preserve. Therefore, Respondent is entitled to immunity.

CONCLUSION

For all the reasons set forth above, and because Petitioners can show no compelling reason for reviewing the Eleventh Circuit's reasonable *per curiam* decision, Patco's Petition for writ of *certiorari* should be denied.

Respectfully submitted,

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In The
Supreme Court of The United States

PATCO ENERGY EXPRESS, LLC,
PATCO ENERGY EXPRESS II, LLC,
PATCO ENERGY EXPRESS III, LLC,
Georgia Limited Liability Companies,

Petitioners,

v.

MICHAEL G. LAMBROS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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28 U.S.C. § 959(a) 6, 12

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Introduction

The question of the viability of the so-called *Barton* Doctrine is a matter which has not been decided by this Court but which should be under Supreme Court Rule 10(c). As shown below, the *Barton* Doctrine, as applied by nine of the eleven circuits, is a misapplication of the case of *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed 672 (1881) which was confined to its facts and did not state a general rule as to whether receivers engaged in any activity could be sued without the permission of the appointing court. Certiorari should be granted on this ground.

Respondent in his Brief in Opposition ("Resp. Br.") asserts that since there is no split in the circuits on the issue of the meaning or viability of the so-called *Barton* Doctrine, this Court should deny the writ.

Petitioners respond that Supreme Court Rule 10(c) provides for certiorari in cases such as this one. Moreover, there is a split in the circuits on application of the *Barton* Doctrine as shown in Resp. Br. 7-8.

Respondent also asserts: (1) there is a viable *Barton* Doctrine derived from the 1881 *Barton v. Barbour* opinion of this Court; (2) that Respondent's appointment as *in personam* receiver was valid until the appointing statute was declared unconstitutional in *Cisco v. Georgia*; (3) Respondent was an *in rem* receiver and the *in rem* portion of the appointing

statute still stands; and (4) Respondent has judicial and qualified immunity.[1]

Petitioners reply: (1) there is no *Barton* Doctrine because the decision in *Barton v. Barbour* has been abrogated by statute; (2) The law of Georgia is that any act done pursuant to a statute subsequently declared unconstitutional such as Respondent's appointment as *in personam* receiver is void *ab initio*; (3) Respondent was not appointed as *in rem* receiver; (4) the appointing order shows there is no judicial immunity for this receiver; and (5) the constitutional violation is so well settled that qualified immunity cannot apply.

Certiorari Should Be Granted

Respondent argues that this case does not involve a split in the circuit and so certiorari should be denied. In footnote 2 on page 7 of Resp. Br., Respondent agrees that all circuits except the Fifth and Eighth have applied the *Barton* Doctrine. This represents a split in the circuits. Since *Barton v. Barbour* was decided 129 years ago, circuits which have not applied it can be considered to have rejected it.

Moreover, Rule 10(c), Supreme Court Rules, provides for certiorari where, as here, a court of appeals has decided an important question of federal law that has not been, but should be, decided by this

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[1] The Eleventh Circuit in the opinion under review did not rule on this issue.

Court. Respondent claims great importance for the so-called *Barton* Doctrine. This Court has not decided if it has been abrogated by statute. The Eleventh Circuit says it has not. This Court should decide this important question.

The Decision in *Barton v. Barbour* is Limited to its Facts

The facts in the *Barton* case are that the receiver was operating a railroad and allegedly negligently injured a passenger riding on the railroad. The holding in the case was limited to those facts:[2]

> We therefore declare it as our opinion that when the court of one State has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another State has no jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property (emphasis added)

Mr. Justice Miller dissented in *Barton* defining the decision as confined to the facts in the case.[3]

The only factual issue before the *Barton* Court was whether a receiver running a business could be sued without the permission of the appointing court. The decision was limited to deciding those facts. The *Barton* Court made only a passing reference to a "general rule" about suing receivers. *See Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the case in which those decisions are announced"); and *Edwards v. Prime, Inc.*, 602 F.2d 1276 1298 (11th Cir. 2010) ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case.")

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[3] The decision which has just been announced declares that for these failures [negligent operation of railroad] he cannot be sued in a court of law, that by virtue of his receivership, he and all his acts, and the business of the road, are exempted from the operation of the common law, and that all parties deal with him on the implied understanding that they abandon the right to have their complaints tried by jury or by the ordinary courts of justice, and can only obtain such relief as may be had at the hands of a master in chancery of the court which appointed him. (emphasis added)

Dictum in *Barton v. Barbour* Should Not Be Followed

This Court is not bound to follow its *dictum* in a prior case. *Central Virginia Comm. College v. Katz*, 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). At a very early date, Chief Justice Marshall explained why *dicta* are not binding. *Cohens v. Virginia*, 6 Wheat. 264, 19 U.S. 264, 5 L.Ed. 257 (1821):

> The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Two Statutes Have Abrogated *Barton*

The ruling as to a receiver operating a business has been abrogated by statute. On March 3, 1887, Congress adopted a statute abrogating *Barton v. Barbour*, (24 St. p. 552, c. 373) as corrected by the Act of August 13, 1888, (25 St. pp. 433, 436 c. 866).[4] This statute, codified as 28 U.S.C. § 124, was

[4] The relevant language is:

> That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave

the predecessor of the present identical statute, 28 U.S.C. § 959(a) adopted in 1948. Section 6 of the 1887 Act specifically repealed "all laws and parts of laws which conflict with" the Act. *Texas & Pacific Railway Co. v. Cox*, 145 U.S. 593, 601-602, 12 S.Ct. 905, 36 L.Ed. 829 (1892).

Congress thus agreed with the *Barton* dissent and adopted the 1887 Act to set aside the only decision actually made in *Barton* — a receiver operating a business could not be sued without the permission of the court appointing him.

In summary, *Barton* decided only that a receiver sued for acts in conducting a business of the receivership could not be sued without permission of the appointing court. In 1887 Congress enacted a statute which abrogated that decision. That statute is still in effect. There is no *Barton* Doctrine or even a viable *Barton* holding.

But, even if all of that is wrong in the eyes of this Court and it finds there was a binding decision in *Barton* to the effect that all receivers, no matter what they were doing, could only be sued with the permission of the appointing court, any such ruling was abrogated by 11 U.S.C. §543(b). This statute requires a receiver holding property subject to a

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of the court in which such receiver or manager was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager as appointed, so far as the same shall be necessary to the ends of justice.

state court's control to turn over the property to the federal court when he learns a suit over that property has been filed in federal court. The decisions cited in the original Petition show the applicability of § 543(b) to this case. *See In re Automotive Professionals, Inc.*, 2007 WL 198595 *7 (Bkrptcy. N.D. Ill. 2007), "Consequently, § 543(b) supersedes the *Barton* Doctrine with respect to a debtor bringing an action to compel the turnover of its property."

There is nothing left of the actual *Barton v. Barbour* holding or the holding the circuits have placed on it.

Lambros' Appointment as Receiver Was Void *Ab Initio*

Respondent argues that *Cisco v. Georgia*, 285 Ga. 656, 680 S.E.2d 831 (2009) declaring unconstitutional his appointment as an *in personam* receiver is irrelevant because: (1) he was duly appointed and served before the *Georgia v. Cisco* decision; and (2) he was also appointed an *in rem* receiver of the Stations. (Resp. Br. at 11.) Neither of those statements is correct as a matter of law.

The initial Petition cites the cases establishing that in Georgia action taken under an unconstitutional statute is void *ab initio* (Pet. At 26.) There is no refutation of any of these cases by Respondent.

Respondent asserts that the state court action named Cisco and his business entities *in personam* and "named" the Stations owned by Cisco's business entities "as defendants *in rem*." (Resp. Br. at 12.) The Stations are only "named" in the title of the complaint. There is no reference to them in the body of the complaint. In any event, this is not relevant because the appointing order is separate from the complaint, so who was a defendant in the complaint has no bearing on any issue in the case.

The receivership appointing court did not include the Stations in the injunction or receivership order.[5] This is the final refutation of Respondent's claim that he was an *in rem* as well as an *in personam* receiver because no property was included in the appointing order as subject to the receiver or otherwise.

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[5] The appointing court introduced the injunction and receivership order with the following:

> II. DEFENDANTS SUBJECT TO ORDER
>
> The Defendants that are subject to this preliminary injunction **and receivership** (hereinafter called "Enjoined Defendants") are: Fairley Cisco, Cisco Travel Plaza, Inc., Cisco Travel Plaza II, Inc., Cisco Oil, Inc., Cisco Express, Inc., Cisco Enterprises, Inc., Althea Cisco Shave, Tammy Cisco Walker, Poor Boys Oil Co., Inc., (Adopting terms of 3/31 Consent Order), Alana McQuarry, (Adopting terms of 3/31 Consent order), United Fuel, Inc., Keldeep Sekhon, Kingsland Management, LLC, Kingsland Management II, LLC. (emphasis added)

Respondent relies on the footnote in *Cisco v. Georgia* court which stated that, "The complaint also included *in rem* forfeiture proceedings against the three truck stops." (emphasis added) (285 Ga. At 656, n.1, 680 S.E. 2d at 832 n.1.) This is irrelevant in view of the receivership appointing order leaving out the Stations or any other property.

Respondent Erroneously Asserts He Has Absolute or Qualified Immunity

Respondent alleges that "as a receiver" he is "entitled to both absolute and qualified immunity." (Resp. Br. at 13). First of all, Respondent was never a valid receiver.

But, the "immunity" of the receiver is governed by the appointing order which states as follows:

> The Receiver and all persons whom he may engage or employ to assist him in carrying out his duties and obligations hereunder shall not be liable for act or omission of the Receiver or such person, or any of their partners, employees, or agents **unless it shall be proven that the Receiver or such other person acted recklessly and in bad faith**. (emphasis added) (*Id.* at 10).

The Georgia law with regard to the appointment of receivers and their powers and

immunities clearly limits the powers and immunities of Georgia equity receivers to those listed in the appointing order:

> O.C.G.A § 9-8-8. Receiver as officer of court; removal of receiver
> (a) The receiver is an officer and servant of the court appointing him, *is responsible to no other tribunal than the court, and must in all things obey its direction.*
> (b) The receiver shall discharge his trust *according to the orders or decrees of the court appointing him.* He is at all times subject to its orders and may be brought to account and removed at its pleasure. (emphasis added).

Therefore, even if Respondent had been constitutionally appointed, which he was not, he did not have judicial immunity because the appointing order stated he was liable for bad faith and reckless conduct.

Qualified Immunity

Lambros claims that he is entitled to qualified immunity. (Resp. Br. at 14) In *Andujar v. Rodriguez*, 486 F.3d 1199, 1202-1203 (11th Cir. 2007), the court defined qualified immunity as follows:

> Qualified immunity protects government officials performing discretionary functions from suits in

> their individual capacities unless their conduct violates *'clearly established statutory or constitutional rights of which a reasonable person would have known.'* ... (internal citations and footnote omitted).

Qualified immunity does not apply where there is a violation of a constitutional right which was "clearly established at the time of the violation." *Pearson v. Callahan*, _____ U.S. _____, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009).

The constitutional rights which Petitioners contend were violated by the seizure of their property are "clearly established statutory or constitutional rights of which a reasonable person would have known." It is well established that the due process clause prohibits the state government from depriving its citizens of property without providing hearings "at a meaningful time." *See, e. g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950). *Fuentes v. Shevin*, 407 U.S. 67, 71 n.3, 92 S.Ct. 1983, 1989 n.3, 32 L.Ed.2d 556 (1972); *Hollis v. Itawamba County Loans, et al.*, 657 F.2d 746, 748 (5th Cir. 1981).

If the government fails to comply with the dictates of the Due Process Clause, the aggrieved party can seek compensatory damages and equitable relief under 42 U.S.C. § 1983. *McKinney v. Pate*, 20 F.3d 1550, 1555, 1557 (11th Cir. 1994) (en banc); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

There were no hearings before or after the seizure. Petitioners' property was just plain stolen by a person acting under an invalid receivership appointment.

Conclusion

It is not too late for this Court to correct the misunderstanding of the original opinion in *Barton v. Barbour* and the fact that the entire issue of suits against receivers relevant to this case has been resolved and stated by statute, 28 U.S.C. §959(a) and 11 U.S.C. §543(b). It is wrong for federal courts to apply what is called the *Barton* Doctrine which does not even exist as a matter of federal law. Respondent insists that nine of the eleven circuits have applied this fictitious doctrine, the latest being the Eleventh Circuit in this case. Only this Court can correct the matter and bring this travesty to an end.

Second, this Court must insist that federal courts apply the clear law of the state in which events occur when that law is controlling. Georgia law, including the Georgia constitution, holds that acts done pursuant to a statute subsequently declared unconstitutional are legal nullities and void *ab initio*. The Eleventh Circuit refused to follow this rule and instead held such acts were valid until the statutes were declared unconstitutional. This erroneous ruling will no doubt be cited to protect acts taken under a statute later declared unconstitutional. This court should prevent the Eleventh Circuit ruling in this case from surviving.

These two issues require this Court to grant certiorari in this case because the failure to do so will result in the survival of unsupported and legally wrong law in the federal system.

Respectfully submitted,

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